(21,063.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 99.

THE BOSTON CHAMBER OF COMMERCE, THE CENTRAL WHARF AND WET DOCK CORPORATION, AND THE BOSTON FIVE CENTS SAVINGS BANK, PLAINTIFFS IN ERROR,

vs.

THE CITY OF BOSTON.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 21, 1909.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between the Boston Chamber of Commerce, the Central Wharf and Wet Dock Corporation and the Boston Five Cents Savings Bank, all corporations established by the laws of Massachusetts having their usual places of business in said Boston, Petitioners and Plaintiffs, and the City of Boston, a municipal corporation duly established by the laws of Massachusetts within said County of Suffolk, Defendant, in a statutory petition for damages, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of March, in the year of our Lord one thousand nine hundred and eight.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by
JOHN A. AIKEN,
Chief Justice of the Superior Court of the
Commonwealth of Massachusetts.

2 COMMONWEALTH OF MASSACHUSETTS, *ss:*

And now, here, the Judges of the Superior Court for the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I, Francis A. Campbell, Clerk of said Superior Court, have hereto set my hand and the seal of said Court this tenth day of March, A. D. 1908.

FRANCIS A. CAMPBELL, *Clerk.*

3 *Bond to Party on Writ of Error.*

(Copy.)

Filed March 2, 1908.

[Seal The Superior Court.]

4 Know all men by these presents,

That we, the Boston Chamber of Commerce, the Central Wharf and Wet Dock Corporation and the Boston Five Cents Savings Bank all corporations under the laws of Massachusetts and located at Boston, Massachusetts, as principals, and Moses Williams of Brookline, Massachusetts, and Daniel D. Morss of Boston, Massachusetts, as sureties, are held and firmly bound unto the city of Boston, a municipal corporation duly established within the County of Suffolk, Massachusetts, in the full and just sum of—One Thousand Dollars,—to be paid to the said city of Boston its certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this thirtieth day of January, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a sitting of the Superior Court of Massachusetts for the County of Suffolk, in a suit depending in said Court, between the Boston Chamber of Commerce, the Central Wharf and Wet Dock Corporation and the Boston Five Cents Savings Bank aforesaid, as petitioners, and the said City of Boston, as respondent, a judgment was rendered for the said petitioners in a less amount than they claimed to be due them, and the said petitioners having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid

5 suit, and a citation directed to the said respondent, said City of Boston citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said petitioners, said Boston Chamber of Commerce, said Central Wharf

and Wet Dock Corporation and said Boston Five Cents Savings Bank, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

BOSTON CHAMBER OF COMMERCE,
By HARRY J. WOOD, *Treasurer.* [SEAL.]
CENTRAL WHARF AND WET DOCK CORPORATION,
By CHARLES A. WILLIAMS, *Treasurer.* [SEAL.]
MOSES WILLIAMS. [SEAL.]
DANIEL D. MORSS. [SEAL.]
THE BOSTON FIVE CENTS SAVINGS BANK,
By JOS. C. HOLMES, *Treas.* [SEAL.]

Sealed and delivered in presence of,

M. L. CUNNINGHAM,
To (H. J. W.)
(D. D. M.)

Approved by

JOHN A. AIKEN,
Chief Justice of the Superior Ct.
of the Commonwealth of Massachusetts.

6 The foregoing bond is hereby approved on behalf of the defendant in error.

THOMAS M. BABSON,
Corporation Counsel.

A true copy of the bond taken by the chief justice at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the Superior Civil Court for the County of Suffolk, in the Commonwealth of Massachusetts.

FRANCIS A. CAMPBELL,
Clerk of said Superior Court.

7 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among our records of our Superior Court for said County of Suffolk, it is thus contained, the following being the entire record in the case.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

THE BOSTON CHAMBER OF COMMERCE, THE BOSTON FIVE CENTS SAVINGS BANK, and THE CENTRAL WHARF AND WET DOCK CORPORATION,

vs.

CITY OF BOSTON.

To the Honorable the Justices of the Superior Court in and for the County of Suffolk:

8 Respectfully represents the Boston Chamber of Commerce, the Boston Five Cents Savings Bank and the Central Wharf and Wet Dock Corporation.

First. That they are all corporations established under the laws of the Commonwealth of Massachusetts and that each has a usual place of business in said Boston; that on the twenty-first day of March, 1901, and for a long time before, the said Boston Chamber of Commerce was the owner in fee of the estate and building thereon situated at the corner of India Street and a private way known as Central Wharf, which has since become the extension of Milk Street, in said Boston; that the said Boston Five Cents Savings Bank at the time was possessed of the interest of mortgagee in said premises; that the said Central Wharf and Wet Dock Corporation was at that time possessed of an easement in said premises.

Second. That by an order of the Board of Street Commissioners of said City, passed and approved on the twenty-first day of March 1901, it was ordered that the public necessity and convenience required that an extension of Milk Street from India Street be constructed over a private way then known as Central Wharf to Atlantic Avenue and that said highway be laid out according to a plan marked "City of Boston, Milk Street, Boston Proper, October 4, 1900, William Jackson, City Engineer," deposited in the office of the City Engineer of said City; said highway laid out as aforesaid is

9 named Milk Street, and is bounded and described as follows: Southwest by India Street one hundred and thirty-two and sixty-two hundredths feet; west by the same thirty and sixty-two hundredths feet; north by the northerly line of the extension of Milk Street as hereby laid out, six hundred and two and thirty-four hundredths feet; east by Atlantic Avenue forty-six and sixty-eight hundredths feet; south by the southerly line of said extension of Milk Street as hereby laid out four hundred and sixty-five and ninety-three hundredths feet and again east by the easterly line of said extension of Milk Street as hereby laid out ninety-eight and seventy-three hundredths feet on a curve of forty feet radius.

Third. That by said order a portion of your petitioners' estate was taken and your petitioners suffered great damage thereby.

Fourth. That in said order it was adjudged by the Board of Street Commissioners that no persons sustained damages in their estates by the laying out and construction of Milk Street as aforesaid.

Wherefore your petitioners say that they are aggrieved by the doings of said Board in the estimation of their damages occasioned by the said laying out and not waiving any right to take advantage by any proceeding at law or in equity of the errors in the
10 aforesaid proceedings, but expressly reserving the right so to do, they pray that the same may be inquired of by a jury at the bar of this Honorable Court.

By Their Attorneys, CHARLES S. HAMLIN,
JOSEPH H. KNIGHT.
CENTRAL WHARF AND WET DOCK CORPORATION,
By MOSES WILLIAMS, *President.*

11 This petition was filed and entered in this Court on the seventeenth day of February, A. D. 1902, when and where the Petitioners appeared by Messrs. C. S. Hamlin and J. H. Knight, their attorneys; and thereupon the following order issued by the Court, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court, January Sitting, A. D. 1902, to wit: 17th February, A. D. 1902.

On the foregoing Petition, Ordered, that the Petitioners give notice to said Respondent to appear at said Court to be held at Boston, within and for said County on the first Monday of April next by serving it with a true and attested copy of said petition, with this Order thereon, thirty days at least before said first Monday of April that it may then and there show cause, if any, why said petition should not be granted.

By the Court,

JOS. A. WILLARD, *Clerk.*

And thereafterwards, to wit: on the third day of March, in said year, said Respondent appeared by its City Solicitor and filed its answer in the words following, to wit:

12 Superior Court.

BOSTON CHAMBER OF COMMERCE & AL., Petitioners,
vs.
THE CITY OF BOSTON.

Defendant's Answer.

Now comes the City of Boston, defendant, and for answer denies each and every allegation of the plaintiffs' petition.

By its attorney,

T. M. BABSON,
City Solicitor.

Subsequently, on the seventh day of said March, 1902, upon an attested copy of said petition and order of notice thereon, return of service was made in the words following, to wit:

SUFFOLK, *ss:*

BOSTON, *February* 27, 1902.

I this day served the within precept upon the City of Boston by delivering it to George U. Crocker Esq., its Treasurer and to Edward J. Donovan Esq., its Clerk to each an attested copy of the within petition and order.

FRANCIS MARTIN,
Deputy Sheriff.

Fees:

Service	1.00
Copies	3.00
Travel	.08
	$4.08

13 Thence the suit was continued from time to time unto the tenth day of January, 1905, when the following appearance in writing was entered, to wit:

SUFFOLK, *ss:*

Superior Court. Sitting, 1904.

BOSTON CHAMBER OF COMMERCE ET AL., Pl'ff,
v.
CITY OF BOSTON, D'f't.

In the above action I appear for The Central Wharf and Wet Dock Co.

CHAS. A. WILLIAMS,
D. R. P., 126 *State St.*

Thence the suit was continued from time to time unto the first day of February, 1907, when and where the parties appeared, as aforesaid, and filed the following, to wit:

SUFFOLK, *ss:*

SEPTEMBER, 1906.

Superior Court.

BOSTON CHAMBER OF COMMERCE ET AL., Petitioners,
vs.
CITY OF BOSTON.

Stipulation.

In the above entitled cause it is stipulated and agreed by all the petitioners in said cause that the jury may find and return a
14 verdict for the total amount of damages sustained by the owners of the property involved in this suit, estimating the

same as an entire estate and as if it were the sole property of one owner in fee simple, and that the total amount of damages so found need not be apportioned by the jury in their verdict among the parties entitled thereto.

BOSTON CHAMBER OF COMMERCE,
By CHARLES S. HAMLIN, *Attorney.*
THE BOSTON 5 CENT- SAVINGS BANK,
By C. S. HAMLIN, *Attorney.*
CENTRAL WHARF AND WET DOCK CORPORATION,
By CHARLES A. WILLIAMS, *Att'y.*

And the Court endorsed the following on said stipulation, to wit: February 1, 1907. Filed as of Jan. 28, 1907, by leave of Court. Attest: Wm. Gilchrist, Ass't Clerk.

Accordingly, the cause, after a full hearing, was submitted to a jury, sworn to try the same, who returned the following verdict, by order of Court, to wit:

SUFFOLK, *ss:*

15 The Superior Court, January Sitting, A. D. 1907.

BOSTON CHAMBER OF COMMERCE, CENTRAL WHARF AND WET DOCK CORPORATION, and BOSTON FIVE CENT- SAVINGS BANK, Pet'n'rs,

—

CITY OF BOSTON, D'f't.

The Jury find for the Plaintiff-, and assess Damages in the sum of five thousand dollars.

GEO. W. CUSHMAN,
Foreman of the Jury.

Rendered January 30, 1907.

Whereupon the case having been submitted to the Court, upon consideration thereof and at the request of both parties, the following report to the Supreme Judicial Court for the Commonwealth was filed by the presiding Judge for the consideration by said Court of the law in the same.

16 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

BOSTON CHAMBER OF COMMERCE, CENTRAL WHARF AND WET DOCK CORPORATION, and BOSTON FIVE CENTS SAVINGS BANK, Petitioners,

vs.

CITY OF BOSTON.

Report.

This is a petition duly filed in the Superior Court in the County of Suffolk by the Boston Chamber of Commerce, the Central Wharf and Wet Dock Corporation and the Boston Five Cents Savings Bank for the assessment of damages, on appeal from the action and order of the Street Commissioners of the City of Boston, because of the taking of part of the property of said petitioners by said City for the extension of Milk Street in said City.

The pleadings may be referred to. The facts proved at the trial were as follows:—

The Boston Chamber of Commerce, at the time of the taking hereinafter referred to, owned in fee certain property situated on India Street and a private way known as Central Wharf or Central Wharf Street, afterwards laid out as an extension of Milk Street as hereinafter set forth, in the City of Boston, on which it had erected a building for the purposes of said Chamber of Commerce.
17 Said property consisted of 15,113.5 square feet of land, and was conveyed to said Chamber of Commerce by deeds from the Central Wharf and Wet Dock Corporation and from Henry M. Whitney, both deeds being dated January 31, 1890.

In the deed of said Central Wharf and Wet Dock Corporation to said Chamber of Commerce (which deed may be referred to by either party) there was contained the following reservation: "Said Corporation (said Central Wharf and Wet Dock Corporation) hereby reserves to itself and its successors and assigns, rights of way, light and air over the part of said premises (the premises conveyed by said deed) bounded Southwest on said India Street one hundred and three and 86/100 (103 86/100) feet; North on said Central Wharf one hundred and ninety-five and 60/100 (195 60/100) feet; East on said passage way twenty (20) feet wide, five (5) feet; South on the remaining part of said premises seventy-five and 6/100 (75 6/100) feet; Southeast, East and Northeast on the same by curved line drawn with a radius of forty (40) feet; eighty-three and 53/100 (83 53/100) feet; and South on land of said Henry M. Whitney four and 6/10 (4 6/10) feet. Containing three thousand five hundred and thirty-nine (3539) square feet and being shown on said plan.

On March 21, 1901, the Board of Street Commissioners of the City of Boston duly and legally laid out said private way known as

Central Wharf or Central Wharf Street from India Street to Atlantic Avenue as a public way and as an extension of Milk Street under the provisions of law authorizing the assessment of betterments, and constructed said street as extended, and by the order of laying
18 out took and laid out for said public way a part of said land, to wit: about 2955 square feet of said parcel containing 3539 square feet described in said reservation in said deed from the said Central Wharf and Wet Dock Corporation to said Chamber of Commerce dated as aforesaid January 31, 1890.

The said Board of Street Commissioners estimated that no persons sustained damages in their estates by the laying out and construction of said extension of Milk Street as aforesaid, and accordingly assessed no damages.

The petitioners being aggrieved by said action of said Board duly requested said Board to reconsider said action and to award substantial damages, and on refusal duly filed a petition to have their damages assessed in this court.

At the time of said laying out and of said taking the Boston Five Cents Savings Bank was and still is the holder of a mortgage on said property, including that covered by the reservation above mentioned, but subject to said reservation.

At the time of said laying out and of said taking no party or person had any interest in the land taken except said Boston Five Cents Savings Bank which had an interest as mortgagee as aforesaid, the Central Wharf and Wet Dock Corporation which had the interests, rights and estates reserved to it by said deed, and the Boston Chamber of Commerce which owned the fee of the land taken, subject to said mortgage held by the said Savings Bank, and
19 subject also to the rights in the land taken which were reserved in said deed from said Wharf Corporation, and all said parties are petitioners for damages in this action.

Apart from said reservation it was possible and practicable for said Chamber of Commerce to have built over said reserved space, including the land so taken, by the extension of the building now on said property, or by the erection of another building. Said reservation was in full force and effect at the time of said taking.

Said land taken had never been dedicated to the public, but was at all times kept in order and repair by said Chamber of Commerce.

On February 26, 1903, said Board of Street Commissioners duly levied a betterment assessment for the laying out and construction of said street on the part of said property which had not been taken, and also levied a similar assessment on property owned by the Central Wharf and Wet Dock Corporation abutting on said new street.

The petitioners filed a stipulation in this case in this court that damages might be awarded in a lump sum to all the parties interested as petitioners, and were not to be apportioned between the petitioners by the jury, but the defendant absolutely refused to assent to such a disposition of the case.

The petitioners contended and asked the court to rule and to instruct the jury (1) that the damages were to be assessed as of the date of the order laying out the street, and that the only persons who

could recover damages on account of such laying out were the persons interested in the land at that time; that as the petitioners together owned the entire title to the 2955 square feet of land so taken for said street, and as they had filed in court a stipulation
20 that the damages might be awarded to the petitioners in a lump sum and were not to be apportioned between the petitioners by the jury, the petitioners were entitled to recover the full fair market value of the property taken, and they offered competent evidence tending to show that such market value was $60,000; (2) That the petitioners were entitled to recover the full fair market value of the land taken, estimating it as if it were an entire estate and as if it were the sole property of one owner in fee simple; (3) That even if as a matter of law the Central Wharf and Wet Dock Corporation was not entitled to recover any damages for or on account of said taking, then the other petitioners jointly, or the Chamber of Commerce alone, were entitled to recover the full market value of the property taken, estimating the same as if the land taken were, at the time of taking, the sole property of one owner in fee simple and unincumbered.

The respondent objected to said rulings asked for by the petitioners, and contended and asked the court to rule that the damages were to be assessed as of the date of the order laying out the street and according to the condition of the title of the land at that time, that the owners of estates for whose possible or probable benefit the restrictions had been placed upon adjoining lands were not the owners of such interests in land as are entitled to damages under Chapter 48 of the Revised Laws, and asked the court to rule that the taking for highway purposes did not take the fee of the land, but only imposed upon it an easement of public travel, and if the jury were of the opinion that when land in this vicinity was subject to a
21 restriction so that it could not be built upon, the only real advantage which came to the owners from its possession was that of light and air, and were of the opinion that light and air from the street would be just as valuable as the light and air from the open space; that as the owners would be relieved by reason of the taking from paying taxes upon the land to be used for street purposes, they could find no damages or such sum as they might think the Chamber of Commerce was entitled to by reason of the taking of this restricted land. That in considering the question of the fair market value of the land taken and the damage, if any, to the remaining estate, they could take into consideration the probability or improbability of the Central Wharf and Wet Dock Corporation releasing its rights in said land so far as such probability or improbability might affect the judgment of a possible purchaser.

The respondent offered to show, by the testimony of witnesses qualified to testify as to the fair market value of land in this part of the City of Boston, that as the land at the time of the passage of the order was owned by the Boston Chamber of Commerce, subject to the reservation and restriction that it could not be built on, which restriction was of great value to the Central Wharf and Wet Dock Corporation, the damage to the fair market value of the estate of

the Boston Chamber of Commerce by reason of said street taking was little or nothing.

The petitioners objected to each and all of said rulings asked for by the respondent, and contended that such evidence was immaterial, incompetent and inadmissible generally, and especially was
22 immaterial and incompetent in this proceeding in which all the parties having any interest in the land taken at the time of the laying out had joined as petitioners, and had filed in court a stipulation that damages might be awarded the petitioners in a lump sum without apportionment between the petitioners, and was calculated to divert the minds of the jury from the real issue in the cause; and also was incompetent and inadmissible for the reason that the proposition contended for by the respondent and sought to be proved by such witnesses was not and could not be the subject of expert testimony; and that even if said proposition could be the subject of expert testimony, the witnesses offered by the respondent, being qualified merely as experts on the value of real estate in this part of the City of Boston, were not qualified to testify upon the subject matter of the respondent's contention.

A plan was used at the trial showing the property taken and the surrounding territory, which may be referred to by either party at the argument before the Supreme Judicial Court for the Commonwealth.

The foregoing was all the evidence in the case.

It was agreed that if the law was substantially as stated in the petitioners' requests for rulings, damages were to be assessed for the petitioners in the sum of $60,000 without interest; and if as matter of law in the state of the title at the time of the taking the petitioners were in no event entitled to full damages, estimating the same
23 as if the land taken were an entire estate and as if it were at the time of the taking the sole property of one owner in fee simple, and if the evidence offered by the respondent was admissible and competent, and the law was substantially as stated in the respondent's requests for rulings, the petitioners' damages should be $5000 without interest.

But the petitioners contended and asked the Court to rule that if the statutes under which these proceedings were brought were to be construed as contended for by the respondent, or so as to deprive the petitioners of the right to recover the full fair market value of the property taken, the statutes as so construed would be unconstitutional under the Constitutions of the Commonwealth and of the United States of America, and particularly and especially under the Fourteenth Amendment of the Constitution of the United States of America, and they contended that such construction of the statutes was erroneous.

I declined to rule as requested by the petitioners, and ruled that the evidence offered by the respondent as to the damages to the petitioners in the state of the title at the time of the taking was admissible, material and competent, and also ruled that in the state of the title at the time of the taking the petitioners as matters of law were in no event entitled, nor were any one or more of them

entitled, to recover the full fair market value of the property estimated as if the property taken were free from all reservations and restrictions; and I ruled that the statute as so construed would not be unconstitutional either under the Constitution of Massachusetts or under the Constitution of the United States, and I directed
24 a verdict for the petitioners for the sum of $5000 without interest, which was returned accordingly, and at the request of the parties I report the case to the Supreme Judicial Court for the Commonwealth.

If my rulings were right, judgment is to be entered for the Petitioners on the verdict for $5000 without interest.

If the substance of the rulings requested by the petitioners ought to have been given, or if the petitioners or any of them in the state of the title at the time of the taking were entitled to recover the full fair market value of the property taken, estimated as if the property taken were free from all reservations and restrictions, the verdict is to be set aside, and judgment is to be entered for the petitioners for $60,000, without interest.

ROBERT R. BISHOP, *J. S. C.*

Thence the suit was continued, to await the decision of said Court, unto the fifteenth day of May, 1907.

And now it is ordered by said Supreme Judicial Court for the Commonwealth, by its rescript, as follows, to wit:

25 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May 14, 1907.

In the case of—

BOSTON CHAMBER OF COMMERCE ET AL.
vs.
CITY OF BOSTON.

Pending in the Superior Court for the County of Suffolk.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,

Judgment on the verdict for five thousand dollars without interest.

By the Court,

C. H. COOPER, *Clerk.*

May 14, 1907.

Brief Statement of the Grounds and Reasons of the Decision.

The ruling at the trial was correct.

And said rescript is entered in said Court, accordingly.

It is therefore considered by the Court, on the third day of June, A. D. 1907, that said The Boston Chamber of Commerce, The Boston

Five Cents Savings Bank and The Central Wharf and Wet Dock Corporation, Petitioners as aforesaid, recover against said The City of Boston, Respondent as aforesaid, said sum of five thousand
26 dollars damages, and costs of suit taxed at sixty-four dollars and fifty-nine cents.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Superior Court to be hereto affixed.

Witness, John A. Aiken, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this tenth day of March, in the year of our Lord one thousand nine hundred and eight.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

[Endorsed:] K. F.

27 *Assignment of Errors.*

(Copy.)

Filed March 2, 1908.

28 In the Supreme Court of the United States.

Between—

THE BOSTON CHAMBER OF COMMERCE ET AL., Petitioners, Plaintiffs in Error,
and
THE CITY OF BOSTON, Respondent, Defendant in Error.

Assignment of Errors.

And the said plaintiffs in error say that in the record and proceedings aforesaid, and in the rendition of said judgment aforesaid there are manifest errors and they assign the following errors, to wit:

1. The Court erred in said judgment and in the rendition thereof in this, that it ruled and decided as matter of law,—against the express contention of the petitioners appearing of record in said cause—that the statutes of Massachusetts (Revised Laws, Chapters 48 and 50) were to be construed and enforced in such wise as to deprive the petitioners of all right to recover just, reasonable and adequate damages for the taking from the petitioners by the right of eminent domain, and for a public use, and against the will of the petitioners, of land owned exclusively by the petitioners at the time of said taking; and also ruled that such construction and enforcement of said statute would not be and was not unconstitutional under the Constitution of the United States and
29 the fourteenth amendment thereto, and said judgment was based wholly and solely on said erroneous and unconstitu-

tional ruling; whereas said Court ought to have ruled and decided in said judgment, in accordance with the contention of the petitioners, appearing of record in said cause, that such construction and enforcement of said statute would be and was unconstitutional under the Constitution of the United States, and under the fourteenth amendment thereto; and that by force of said erroneous ruling and judgment the petitioners have been deprived of their property without due process of law and without just compensation, and have been denied the equal protection of the laws, in violation of the Constitution of the United States, and of the fourteenth amendment thereto.

2. The Court erred in said judgment and in the rendition of said judgment in this, that although it appeared of record in said cause, that land owned exclusively by the petitioners in said cause had been taken from the petitioners by the defendant, the City of Boston, for a public use, without the consent of the petitioners, and by the paramount right of eminent domain, whereby and by reason of said taking the petitioners in said cause, being the plaintiffs in error, became entitled to recover of said City just, reasonable and adequate compensation for the land so taken, yet the Court in said judgment ruled and decided as matter of law, against the right of the petitioners to recover such just, reasonable and adequate compensation for such land so taken, thereby denying to the petitioners the equal protection of the laws, and depriving them of their property without due process of law and without just compensation, in violation of the Constitution of the United States, and of the fourteenth amendment thereto.

3. The Court erred in said judgment and in the rendition of said judgment in this, that although it appeared of record in said cause, that land owned exclusively by the petitioners in said cause had been taken from the petitioners by the defendant, the City of Boston, for a public way, without the consent of the petitioners, and by the paramount right of eminent domain, whereby and by force of which taking the petitioners had been deprived forever of all right to the beneficial use of said land, and could only use the same for the purposes of a way to the same extent only as the general public could use said land, and in common with the general public; and whereby and by force of which taking the petitioners became entitled in and by these proceedings to recover of the defendant just, reasonable and adequate damages for such taking, and these proceedings were the only proceedings which could be instituted by the petitioners for the recovery of such just, reasonable and adequate damages, yet the said Court ruled and decided as matter of law in and by said judgment, against the right of the petitioners to recover such just, reasonable and adequate damages for such taking, in these the only proceedings open to the petitioners for the recovery of such damages, thereby depriving the petitioners of their property without due process of law and without just compensation, and denying them the equal protection of the laws in violation of the Constitution of the United States, and of the fourteenth amendment thereto.

4. The Court erred in said judgment and in the rendition of said judgment in this, that whereas it appeared of record in said cause that land owned exclusively by the petitioners in

said cause had been taken from the petitioners by the defendant for a public use, without the consent of the petitioners and by the paramount right of eminent domain, whereby the petitioners became entitled in and by these proceedings to recover just and adequate compensation for such taking, and whereas these proceedings were and are the only proceedings which could be instituted by the petitioners for the recovery of such compensation, and whereas it also appeared of record in said cause that such just and adequate compensation amounted in this cause to the sum of sixty thousand dollars, yet said Court ruled and decided as matter of law, that the petitioners were only entitled to recover compensation for such taking based upon and limited by the use of said land taken which the petitioners were actually making at the time of such taking, and ruled and decided as matter of law that the petitioners were only entitled to recover as damages a sum much less than would be just and adequate compensation for such taking, thereby and by force of said decision depriving the petitioners of their property without due process of law, without just compensation, and denying them the equal protection of the laws in violation of the Constitution of the United States, and of the fourteenth amendment thereto.

5. The Court erred in said judgment and in the rendition of said judgment, in this, that although it appears by the record of said cause that it was agreed by the parties to said cause, and found as matter of fact upon the record of said cause, that the land taken by the respondent, at the time of the taking, was owned exclu-
32 sively by the petitioners, the Boston Chamber of Commerce, one of the petitioners, owning the fee of said land subject to a mortgage held by the Boston Five Cents Savings Bank, also one of the petitioners, and the Central Wharf and Wet Dock Corporation, also one of the petitioners owning easements of way, light and air in and over said land secured to it by reservation in the deed of said land; that no other person or persons were interested in said land; that said land had never been dedicated to the public, that it was possible and practicable, apart from said reservation, for said Chamber of Commerce to extend its existing building over said land, or to erect a new building on said land; that the fair market value of said land was sixty thousand dollars; and although it appears of record in said cause that said land had been taken from the petitioners in said cause, by the respondent, by right of eminent domain, for a public use, to wit: for a public street or way in the City of Boston, without the consent of the petitioners, whereby and by force of said taking, the said petitioners had been deprived forever of all beneficial use of said land, and whereby the petitioners became entitled to just and adequate compensation for such taking under the fourteenth amendment to the Constitution of the United States; and although the proceedings in said Court were and are the only proceeding which could or can be instituted to recover such or any compensation, yet said Court ruled and decided in said judgment as matter of law that said petitioners were not entitled, under said proceedings or in any proceedings, to recover as damages the fair market value of said property agreed, as above set forth, to be the sum of

sixty thousand dollars, but were entitled, as matter of law, to
33 recover only nominal damages, thereby and by force of said judgment depriving said petitioners of their property without due process of law and without just compensation, and denying them the equal protection of the laws in violation of the fourteenth amendment of the Constitution of the United States.

6. The Court erred in said judgment and in the rendition of said judgment in that it ruled and decided in said cause, as matter of law, that said petitioner, the Central Wharf and Wet Dock Corporation, found in the record of said cause at the time of the taking therein referred to, to be the owner of an interest in the land taken by virtue of a reservation contained in a deed of said land from said Central Wharf and Wet Dock Corporation to the petitioner, the Boston Chamber of Commerce, was not entitled in this, the only proceeding open to it for the recovery of damages for said taking, to recover any compensation in damages for or on account of said taking, although said taking was made by the respondent by the right of eminent domain for the purpose of a public street or way of said City of Boston, and against the will of said Central Wharf and Wet Dock Corporation, and although by force of said taking said Central Wharf and Wet Dock Corporation was deprived of all its interest in and of the right to sell its interest in said land, or to release its said interest in said land for a valuable consideration to said Boston Chamber of Commerce, or to have and enjoy any rights in said land except in common with the general public and as one of the public, and as limited and circumscribed by said taking; thereby depriving said Central Wharf and Wet Dock Corporation of its property without just compen-
34 sation and without due process of law, and denying it the equal protection of the laws in violation of the Constitution of the United States and of the fourteenth amendment thereto.

7. The Court erred in said judgment and in the rendition of said judgment in that it ruled and decided, as matter of law, that the Boston Chamber of Commerce, one of the petitioners in said cause, was, as matter of law, entitled to recover only nominal damages for the taking by the respondent by the paramount right of eminent domain and against the will of said petitioner, of land owned at the time of the taking by said petitioner, and was not entitled to recover as such damages the full fair market value of said land taken which, as appears in the record of said cause, was the sum of sixty thousand dollars, although this proceeding for the recovery of damages was and is the only proceeding open to the said petitioner for the recovery of compensation for such taking, thereby deciding against the right of said petitioner to recover adequate damages for such taking and thereby depriving the said petitioner of its property without due process of law and without just compensation, and denying it the equal protection of the laws in violation of the Constitution of the United States and of the fourteenth amendment thereto.

8. The Court erred in said judgment and in the rendition thereof in that it ruled and decided, as matter of law, that all the petitioners, whether jointly or severally, suffered no material damage by reason

of the taking of their property by the respondent by the paramount right of eminent domain, for a public way, and were not entitled to recover as damages either the full market value of the property taken, or even substantial damages for such taking, or any sum as
35 damages in excess of nominal damages; although it appeared in said cause that the petitioners were the sole owners of said land at the time of said taking, that said land never had been dedicated to the public, that these proceedings were the only proceedings which could be instituted by the petitioners for the recovery of damages for such taking, and that said land at the time of said taking had a substantial market value of sixty thousand dollars, thereby and by force of said judgment depriving the petitioner of their property without just compensation and without due process of law, and denying them the equal protection of the laws in violation of the Constitution of the United States, and of the fourteenth amendment thereto.

9. The Court erred in said judgment and in the rendition thereof in this, that it ruled and decided that the petitioners, whether jointly or severally, were entitled, as matter of law, to recover only such damages for the land taken as the petitioner, the Boston Chamber of Commerce, suing alone, could recover for the taking of said land subject at the time of said taking to the easements and interests which the Central Wharf and Wet Dock Corporation had in said land, although it appeared in said cause that said land was taken by paramount right of eminent domain against the will of the petitioners; that the petitioners together at the time of such taking were the sole owners of said land, that said land had never been dedicated to the public, and that these proceedings are and were the only proceedings open to the petitioners for the recovery of damages for such taking, thereby and by force of said judgment depriving the
36 petitioners of their property without just compensation and without due process of law, and denying them the equal protection of the laws in violation of the Constitution of the United States and of the fourteenth amendment thereto.

10. The Court erred in said judgment and in the rendition of said judgment in this that although it appeared in the record of said cause, that land owned exclusively by the petitioners had been taken by the respondent for a public way, by the paramount right of eminent domain and without the consent of the petitioners, and that these proceedings were the only proceedings under the laws of Massachusetts whereby the petitioners could secure damages for such taking, and although it appeared in said record that the value of the land taken, if free from all reservations and restrictions, was sixty thousand dollars, and that the petitioners at the time of said taking owned said land free from all reservations and restrictions, or rights of any nature, public or private, yet said Court ruled and decided, as matter of law, that the petitioners were not entitled to recover as damages said value of said land, said sixty thousand dollars, thereby and by force of said judgment depriving the petitioners of their property without due process of law, and denying them the equal protec-

tion of the laws in violation of the Constitution of the United State
and of the fourteenth amendament thereto.

11. The Court erred in said judgment and in the rendition thereo
in this, that it ruled as matter of law, against the express contentio
of the petitioners appearing of record in said cause that the statute
of the Commonwealth of Massachusetts under which these proceed
ings were brought, (proceedings under which statutes wer
37 and are the only proceedings under the laws of said Com
monwealth open to the plaintiffs in error to secure damage
for land taken from the said plaintiffs by the respondent, by the para
mount right of eminent domain, and the exclusive remedy of th
said plaintiffs in the premises) were to be construed and enforced s
as to deprive the plaintiffs of the right to recover as damages the ful
fair market value of the property taken, and ruled that such con
struction and enforcement of said statutes would not be unconstitu
tional under the Constitution of the United States or under the four
teenth amendment thereto, whereas said Court ought to have rule
and decided in said judgment in accordance with the contention o
the plaintiffs appearing of record in said cause, that such construc
tion and enforcement of said statute would be and was unconstitu
tional under the Constitution of the United States and under th
fourteenth amendment thereto, and that by force of said erroneou
ruling and judgment the plaintiffs in error have been deprived o
their property without due process of law, and have been deprived o
their property without just and adequate compensation, and hav
been denied the equal protection of the laws in violation of the Con
stitution of the United States and of the fourteenth amendmen
thereto.

12. The Court erred in said judgment and in the rendition thereo
in this, that it ruled, as matter of law, that the testimony of wit
nesses offered by the respondent to show "that as the land at the tim
of the passage of the order (of taking) was owned by the Bosto
Chamber of Commerce, subject to the reservation and restriction tha
it could not be built on, which restriction was of great value to th
Central Wharf and Wet Dock Corporation, the damage to th
38 fair market value of the estate of the Boston Chamber o
Commerce by reason of said street taking was little or noth
ing" was admissible, material and competent, against the objection
of the petitioners, appearing on the record, that such testimony wa
inadmissible, immaterial and incompetent generally, and especially
was immaterial and incompetent in this proceeding, in which all th
parties having any interest in the land taken at the time of the lay
ing out had joined as petitioners, and had filed in Court a stipulatio
that damages might be awarded the petitioners in a lump sum, with
out apportionment between the petitioners, and was calculate- t
divert the minds of the jury from the real issue in the case; and als
was incompetent and inadmissible for the reason that the propositio
contended for by the respondent and sought to be proved by suc
witnesses was not and could not be the subject of expert testimony
and that even if said proposition could be the subject of expert testi
mony, the witnesses offered by the respondent, being qualified merely

as experts of the value of real estate in this part of the City of Boston, were not qualified to testify upon the subject matter of the respondent's contention.

13. The Court erred in said judgment and in the rendition thereof in this, because said Court directed a verdict, and because said Supreme Judicial Court of the Commonwealth of Massachusetts, ordered judgment on said verdict, which judgment was entered for the petitioners in the sum of five thousand dollars, without interest, in accordance with the erroneous rulings of law more particularly set forth in the preceding assignment of errors, whereas said Court
39 ought to have entered judgment for the petitioners in the sum of sixty thousand dollars, thus by such erroneous construction and enforcement of the above statutes taking the property of the petitioners without just compensation and without due process of law, in violation of the fourteenth amendment of the Constitution of the United States, as herein more particularly set forth in the previous assignment of errors.

14. The Court erred in said judgment, and in the rendition thereof in this, that whereas it was agreed between the parties and appears on the record of this cause that if the law was substantially as stated in the petitioner's requests for rulings, damages were to be assessed for the petitioners in the sum of sixty thousand dollars, without interest, said Court nevertheless declined to give the rulings requested by the petitioners, or the substance of said rulings, which rulings were as follows, to wit:

1. That the damages were to be assessed as of the date of the order laying out the street, and that the only persons who could recover damages on account of such laying out were the persons interested in the land at that time; that as the petitioners together owned the entire title to the 2955 square feet of land so taken for said street, and as they had filed in Court a stipulation that the damages might be awarded to the petitioners in a lump sum and were not to be apportioned between the petitioners by the jury, the petitioners were entitled to recover the full fair market value of the property taken.

2. That the petitioners were entitled to recover the full
40 fair market value of the land taken estimating it as if it were an entire estate and as if it were the sole property of one owner in fee simple.

3. That even if as a matter of law the Central Wharf and Wet Dock Corporation was not entitled to recover any damages for or on account of said taking, then the other petitioners jointly or the Chamber of Commerce alone, were entitled to recover the full market value of the property taken estimating the same as if the land taken were, at the time of the taking, the sole property of one owner in fee simple and unencumbered.

15. The Court erred in said judgment and in the rendition thereof in this, that although it was agreed by the parties and appears of record in said cause, that if the law was substantially as stated in the petitioners' requests for rulings, damages were to be assessed for the petitioners in the sum of sixty thousand dollars without interest; and if as matter of law in the state of the title at the time of the taking

the petitioners were in no event entitled to full damages, estimating the same as if the land taken were an entire estate and as if it were at the time of the taking, the sole property of one owner in fee simple, and if the evidence offered by the respondent was admissible and competent, and the law was substantially as stated in the respondent's requests for rulings, the petitioners' damages should be five thousand dollars without interest, said Court ruled and decided as matter of law that in the state of the title at the time of the taking, the petitioners as matter of law were in no event entitled nor were
41 any one or more of them entitled to recover the full fair market value of the property estimated as if the property taken were free from all reservations and restrictions, and that the statute as so construed would not be unconstitutional under the Constitution of the United States and directed the jury to return a verdict for the petitioners for the sum of five thousand dollars without interest and ordered judgment on said verdict, whereas said Court ought to have directed a verdict for the petitioners for the sum of sixty thousand dollars and ought to have entered judgment for the petitioners for the sum of sixty thousand dollars.

16. The Court erred in said judgment and in the rendition thereof in this, that it declined to direct the jury to find a verdict in favor of the petitioners in the sum of sixty thousand dollars, without interest, and in that said Supreme Judicial Court refused to order that the verdict rendered be set aside and judgment entered for the petitioners in said sum of sixty thousand dollars, without interest, thus taking the property of the petitioners without due process of law and without just compensation, in violation of the fourteenth amendment of the Constitution of the United States.

17. That by said refusal to rule as requested by the petitioners and by such construction and enforcement of the statutes under which these proceedings were brought, the property of the petitioners was taken without due process of law and without just compensation, in violation of the fourteenth amendment of the Constitution of the United States, which constitutional question was raised by the
42 petitioners in said Superior and Supreme Courts as duly appears on the record of this cause was decided adversely to the contention of the petitioners and was necessary to the decision of said case as rendered.

And the plaintiffs in error pray that said judgment for the errors aforesaid and others in the record and proceedings aforesaid may be reversed, annulled and held for nothing, and that judgment may be ordered for the plaintiffs in error for the sum of sixty thousand dollars and costs.

CHARLES A. WILLIAMS,
CHARLES S. HAMLIN,
Counsel for Plaintiffs in Error.

43 [Endorsed:] Boston Chamber of Commerce *et al.*, Pl'ffs in Error, *vs.* City of Boston, Defendant in Error. Assignment of Errors. Copy. M. A. S.

44 *Petition for Writ of Error.*

(Copy.)

Filed March 2, 1908.

45 To the Honorable the Chief Justice of the Superior Court for the Commonwealth of Massachusetts:

Respectfully represent the Boston Chamber of Commerce, the Central Wharf and Wet Dock Corporation and the Boston Five Cents Savings Bank, all corporations established under the laws of said Commonwealth having their usual places of business in Boston in the County of Suffolk in said Commonwealth, that on the first Monday in June, A. D. 1907, to wit: on June 3rd, 1907, the Superior Court of the Commonwealth of Massachusetts within and for the County of Suffolk rendered a judgment for your petitioners in a certain cause wherein your petitioners were petitioners and the City of Boston, a municipal corporation duly established by law within said County of Suffolk was respondent for the sum of Five Thousand Dollars ($5,000) as will appear by a reference to the records and proceedings in said cause and by the docket of said Court; and that said Court is the highest Court of said Commonwealth in which a decision in said cause could be had.

And your petitioners claim the right to remove said judgment to the Supreme Court of the United States by writ of error, because they claimed in said cause, among other claims therein made by them, that on the facts appearing of record in said cause, they were entitled to recover of the respondent the full fair market value of certain land taken from the petitioners by the respondent by the right of eminent domain, which fair market value of said
46 land, as appears by the record of said cause was Sixty Thousand Dollars ($60,000), and said Court erred in said judgment and in the rendition thereof in this, that it ruled that in the state of the title at the time of the taking of the land in question in said proceedings, the petitioners as matter of law were in no event entitled nor were any one or more of them entitled to recover the full fair market value of the property taken estimated as if the property taken were free from all reservations and restrictions, and ruled that the statute as so enforced would not be unconstitutional under the Constitution of the United States and directed a verdict for the petitioners for the sum of Five Thousand Dollars ($5,000) and entered judgment for the petitioners for Five Thousand Dollars ($5,000), whereas said Court ought to have ruled and decided as was contended by the petitioners as appears by the record and proceedings in said cause that the petitioners were entitled to recover of the respondent the sum of Sixty Thousand Dollars ($60,000), and said Court ought to have ordered a verdict for the petitioners for the sum of Sixty Thousand Dollars ($60,000), and ought to have entered judgment for the petitioners for Sixty Thousand Dollars ($60,000), and ought to have ruled and decided that the statute

of the Commonwealth enforced as the Court in fact enforced it would be unconstitutional and void and ought to have enforced the statute as the petitioners contended; and that by the rendition of said judgment the petitioners have been deprived of their property without due process of law and without just compensation
47 and have been denied the equal protection of the laws in violation of the Constitution of the United States and of the fourteenth amendment thereto.

Wherefore your petitioners pray the allowance of a writ of error returnable to the Supreme Court of the United States and for a citation thereon.

THE BOSTON CHAMBER OF COMMERCE,
By CHARLES S. HAMLIN, *Its Attorney.*
THE CENTRAL WHARF AND WET DOCK CORPORATION,
By CHARLES A. WILLIAMS, *Its Att'y.*
THE BOSTON FIVE CENTS SAVINGS BANK,
By SAM'L T. HARRIS, *Its Att'y.*

48 [Endorsed:] Boston Chamber of Commerce *et al. vs.* City of Boston. Pet'n for writ of error. Copy. K. F.

49 *Certificate of Reporter of Decisions and Opinion of Full Court.*

(Copy.)

50 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *March* 3, 1908.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Boston Chamber of Commerce *et al. vs.* City of Boston decided on the 14th day of May, 1907.

HENRY WALTON SWIFT,
Reporter of Decisions.

51 KOWLTON, *C. J.:*

On March 21, 1901, the Boston Chamber of Commerce owned in fee certain property, consisting of more than fifteen thousand square feet of land, on which it had erected a building for its own purposes. This land was acquired in January, 1890, in part from Henry M. Whitney and in part from the Central Wharf and Wet Dock Corporation. In the deed from this corporation there was a reservation of rights of way, light and air over a part of the premises described by metes and bounds, and containing thirty-five hundred and thirty-nine square feet. The boundary of one side of this reserved space is a curved line, drawn with a radius of forty feet, eighty-three and fifty-three one hundredths feet in length, so as to conform to the curved front of the building erected by the Chamber of Commerce on the lot conveyed. Adjacent to the lot was a private way
52 known as Central Wharf, or Central Wharf Street. On March 21, 1901, the board of street commissioners of Boston

laid out this private way as a public street—an extension of Milk street from India street to Atlantic avenue—and, by the order of laying out, took for the public street about twenty-nine hundred and fifty-five square feet of land from the parcel belonging to the Chamber of Commerce, included in the reservation. The street commissioners estimated that no persons had sustained damages by the extension of Milk street, and accordingly assessed no damages. At the time of the laying out, the Boston Five Cents Savings Bank held, and now holds, a mortgage on the land, including that covered by the reservation.

This is a petition brought by these three corporations jointly, under the R. L. c. 48, s. 20, for the assessment of damages for the taking of this land. The petitioners filed a stipulation in the case that damages might be awarded in a lump sum to all the parties interested, without an apportionment; but the respondent refused to assent to such a disposition of the case.

The contending parties, at the trial, differed widely in their view of the law applicable to the facts of the case. The respondent offered
53 to prove that the restriction was of great value to the Central Wharf and Wet Dock Corporation, which at the time of the laying out was an owner of property on the private way that was laid out as a public street. While the report states that, apart from the reservation, it was possible and practicable for the Chamber of Commerce to have built over the reserved space, it might fairly be contended from the appropriation and use of the property by the Chamber of Commerce, as shown by the deeds and plan, that the keeping of this space open was of great value to the remainder of its estate, occupied by the building, and that this use of the land, for the benefit of the parties under the deeds, was the best use to which it could be put, and that the appropriation of it to this use was intended to be permanent. The respondent contended that, inasmuch as the taking of the property for a street only imposed upon it an easement for public travel, the Chamber of Commerce suffered little if any damage, in view of the restrictions previously existing upon the land, and that, in considering the market value of the land taken and the damage to the remaining estate, the jury could consider the probability or improbability of the Central Wharf and Wet Dock Corporation releasing its rights in the land, so far as this might affect the judgment of a possible purchaser. It also contended that the Central Wharf and Wet Dock Corporation suffered no damage that could be recovered under this petition.

The petitioners contended that they were entitled to re-
54 cover the full fair market value of the land taken, estimating it as if it were an entire estate, and as if it were the sole property of one owner, in fee simple. They offered evidence tending to show that such market value was sixty thousand dollars. It was agreed that, if the law was substantially as stated in the petitioners' requests for rulings, damages were to be assessed in the sum of sixty thousand dollars, without interest, and if the law was substantially as the respondent contended, the petitioners' damages should be five thousand dollars, without interest.

We understand that the petitioners' contention calls for an award that shall equal the full value of the land included in the taking, as it would be if there were no restrictions upon it, and if it were available for use for the erection of buildings, or for other purposes such as give the land in that vicinity its market value.

The difference between the contentions of the parties, as we understand them, may be illustrated as follows: Suppose that B owns a tract of land between two parallel streets thirty rods apart, in a rapidly growing city. Suppose that he locates a private street four rods wide through his land, connecting the two streets, and lays out building lots three rods wide on each side of it, and sells each lot to a purchaser, bounding him on the side of the private street, and giving him a right to use it as a street, while he retains the fee in himself. Suppose that a dwelling house is erected by each purchaser on his lot, and the city then lays out the private street as a public street, and a petition is brought, in which B and the twenty lot owners join for the assessment of damages. A hearing is had upon the petition. Under the R. L. c. 48, s. 22, which is relied on by the present petitioners, "if on such hearing the jury find any of the parties entitled to damages, they shall first find and set forth in their verdict the total amount of damages sustained by the owners of such property, estimating the same as an entire estate, and as if it were the sole property of one owner in fee simple, and they shall then apportion such damages among the several parties whom they find to be entitled thereto, in proportion to their several interests, and to the damages sustained by them respectively, and set forth such apportionment in their verdict, and if they find that any party has not sustained damage, they shall set forth in their verdict that they award him no damages." It is obvious, in the case supposed, that no one of the lot owners suffers any damage; for the public easement taken by the authorities leaves every abutter with as advantageous rights to use the public street as he had before to use the private street. B suffers no substantial damage; for he still remains the owner of the fee of the street, and the public easement that is taken from him only extends to the general public the same right to use the street which twenty house owners and the persons coming to their houses had before. Besides, the city assumes the burden of keeping the street in repair. According to the contention of the petitioners in this case, these twenty-one persons who own rights in the private street which, if united, would make a perfect title in fee simple, can recover as damages, under their petition, the fair market value of the one hundred and twenty square rods of land included in the taking, estimated as if it were the property of a sole owner, free from all restrictions or incumbrances, ready for use for building lots or for any other purpose. Such a startling result compels a careful scrutiny of the statute to discover its true meaning.

It is to be noted that the section quoted above and the other provisions of the chapter are intended merely to provide compensation for that which is taken, and for any injury to property that is not taken. The law does not give to any one more than the damages

that he sustains. It is a familiar rule that the damages are to be assessed in reference to conditions existing at the time of the taking. Because the taking of land for a highway or a railroad is an appropriation of it for all time, which ordinarily will deprive the owner of any valuable use of it in the future, the value of the easement taken is usually substantially the same as the value of the land. So, in many cases, the value of the land taken is referred to as the
57 principal element of the damages to be assessed. Commonwealth *v.* Coombs, 3 Mass., 489-492. Presbrey *v.* Old Colony and Newport Railway Company, 103 Mass., 1-7. Chase v. Worcester, 108 Mass., 60-67. Edmunds *v.* Boston, 108 Mass., 535-544-545. But in a case like the present, or like the one supposed, the value of the land, free from incumbrances, is very much more than the value of the easement taken. In the case supposed the private way was subject to an easement in favor of twenty house owners, before the taking, substantially the same as that taken for the public. It was far more valuable to the owners of this easement for use as a street than it could be for any other purpose. It was permanently appropriated to the use for which the easements were created, and it was so much more valuable for that use than for any other, that a change of the use or an abandonment or sale of the easements would be hardly possible. Under these conditions the value of the easement taken, or the diminution in value of the property by reason of the taking of the public easement, would be but little if anything; for the taking would not materially affect the value or the use of the property. Under section twenty-two, above quoted, the jury are to find, not the value of the land, estimating it as an entire estate and as if it were the sole property of one owner in fee simple; but they are to find the total amount of damages sustained by the owners. The value of the land is of no consequence, except as an aid in determining the value of the easement taken for the public, or
58 the diminution in value of the land by reason of the taking of the easement. If, before the taking, the land is subject to an easement nearly or quite as permanent in its nature as the easement taken for the public, and substantially the same in its effect upon the land in reference to other uses of it, very little, if any, value is taken from it by the taking of the public easement.

If, in the case that we have supposed, the owner of the land, instead of selling his building lots, had built a house upon each of them, and had been the owner of the private street and of houses built upon all the lots on each side of it when it was laid out as a public street, the same principles would apply. In that case the land of the private street would have its greatest value in a use which is not materially affected by the taking of the easement for the public. This is in accordance with the doctrine which underlies the assessment of damages in all cases of the taking of property under the right of eminent domain. Allen *v.* Boston, 137 Mass., 319. Abbott *v.* Inhabitants of Cottage City, 143 Mass., 521-526.

The provision in the R. L. c. 50, s. 3, that "the damages for land taken shall be fixed at the value thereof before such laying out, relocation, alteration, widening," etc., referred to in Benton *v.* Brook-

line, 151 Mass., 250, means that the damages are not to be enhanced by an increase in value that results from the laying out or other change. It does not mean that, when the value of the
59 easement taken is less than the value of the land, the owner is to be paid the whole value of the land.

The contention of the petitioners at the trial was erroneous. If they were to receive the whole value of the land as an estate in fee simple, free from restrictions and incumbrances, they would be paid a large sum for the taking of an easement which would not affect the use that they were making of the land, and the use which, very likely, was the most valuable to which the land could ever be put, even if it never was taken for a public street.

Judgment on the verdict.

60 [Endorsed:] Boston Chamber of Commerce *et al. vs.* City of Boston. Certified Copy of the Opinion of the Supreme Judicial Court.

61 The following is the—

Original Citation and Acknowledgment of Service Thereon.

Filed March 2, 1908.

62 UNITED STATES OF AMERICA, *ss:*

To the City of Boston a municipal corporation duly established by law within the County of Suffolk and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Superior Court of Massachusetts, for the County of Suffolk, wherein the Boston Chamber of Commerce, the Central Wharf and Wet Dock Corporation and the Boston Five Cents Savings Bank all corporations established by the laws of Massachusetts having their usual places of business in Boston in said County of Suffolk are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered for the said plaintiffs in error as in the said writ of error mentioned, in a less amount than they claimed to be due them, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John A. Aiken Chief Justice of the Superior Court of the Commonwealth of Massachusetts, this second day of March, in the year of our Lord one thousand nine hundred and eight.

JOHN A. AIKEN,
Chief Justice of the Superior Court of the Commonwealth of Massachusetts.

BOSTON, *March* 2, 1908.

Due service of the foregoing citation is hereby acknowledged on behalf of the defendant in error.

THOMAS M. BABSON,
Corporation Counsel for City of Boston.

63 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

I, Francis A. Campbell, clerk of the Superior Civil Court for said County of Suffolk, do hereby certify that the foregoing are true copies of,—

1. The assignment of errors.
2. The petition for writ of error.
3. The opinions of the full Court of the Supreme Judicial Court for the Commonwealth of Massachusetts, annexed to and transmitted with the record.
4. And all the proceedings in said case, with all things concerning the same, together with,—
5. The original citation, and,—
6. The acknowledgment of service thereon.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court, this tenth day of March, in the year of our Lord one thousand nine hundred and eight.

[Seal The Superior Court.]

FRANCIS A. CAMPBELL,
Clerk of Superior Civil Court.

[Endorsed:] L. N. H.
[Endorsed:] L. N. H.

Endorsed on cover: File No. 21,063. Massachusetts superior court. Term No. 99. The Boston Chamber of Commerce, The Central Wharf and Wet Dock Corporation, and The Boston Five Cents Savings Bank, plaintiffs in error, *vs.* The City of Boston. Filed March 11th, 1908. File No. 21,063.

(21,063)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 99

THE BOSTON CHAMBER OF COMMERCE, THE CENTRAL WHARF AND WET DOCK CORPORATION, AND THE BOSTON FIVE CENTS SAVINGS BANK . . . . PLAINTIFFS IN ERROR

v.

THE CITY OF BOSTON . . . . DEFENDANT IN ERROR

IN ERROR TO THE SUPERIOR COURT OF MASSACHUSETTS

BRIEF FOR THE PLAINTIFFS IN ERROR

CHARLES A. WILLIAMS
CHARLES S. HAMLIN
Counsel

(21,063)

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IN ERROR TO THE SUPERIOR COURT OF MASSACHUSETTS

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to reverse a judgment of the Superior Court of the Commonwealth of Massachusetts, being the highest Court in said Commonwealth in which a decision in the suit could be had.

The suit was a petition to recover damages for land of the plaintiffs in error, taken by the City of Boston for a public way, begun in said Superior Court, and after a jury trial in said Court the case was reported by that Court to the Supreme Judicial Court of the Commonwealth of Massachusetts, the highest Court of Errors in

Massachusetts. After the argument and decision of the last-mentioned Court the judgment in question was entered in said Superior Court in accordance with the rescript and opinion of said Supreme Judicial Court. Said judgment was entered on June 3, 1907 (Record, p. 12), and thereupon this writ of error was sued out. The plaintiffs in error are hereinafter spoken of as "the petitioners."

The facts of the case were these:—

On March 21, 1901, and for many years prior thereto, the Boston Chamber of Commerce, one of the petitioners, owned in fee simple a tract of land containing about 15,113.5 square feet, situated between India Street, a public way of the City of Boston, Massachusetts, and a private way known as Central Wharf, or Central Wharf Street.

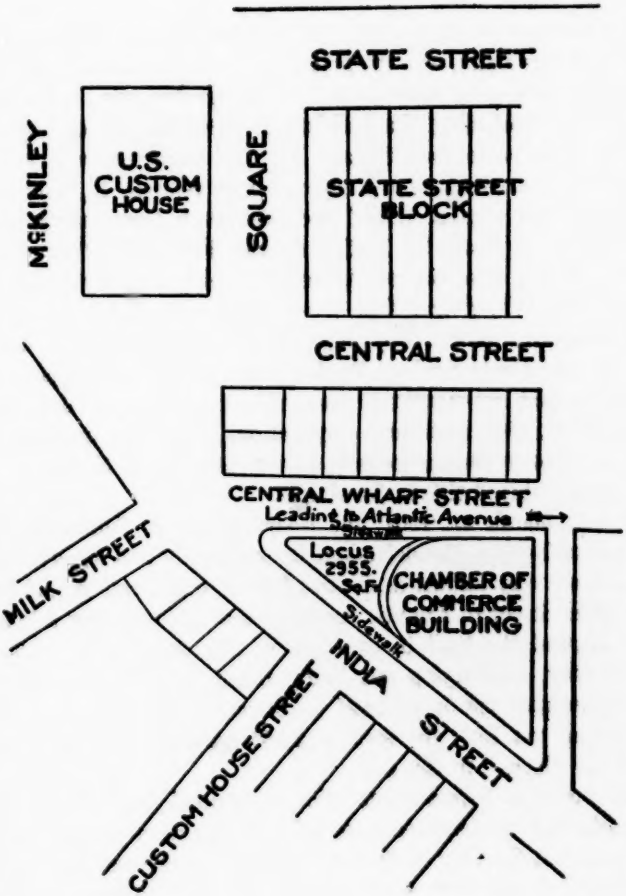
This land the Chamber of Commerce had purchased in 1890 from one Whitney and the petitioner, the Central Wharf and Wet Dock Corporation.

The deed of the Central Wharf and Wet Dock Corporation to the Chamber of Commerce contained the following reservation: "Said Corporation [the Central Wharf and Wet Dock Corporation] hereby reserves to itself, and its successors and assigns, rights of way, light and air over the part of said premises (*i.e.* the premises conveyed by said deed) bounded, etc.," . . . and containing 3,539 square feet.

A part of the premises covered by this reservation, namely, an area of 2,955 square feet, constitutes the "locus" in this suit; and in lieu of the description by metes and bounds given in said deed (see Record, p. 8) for greater clearness is shown graphically on the sketch here given, the greater part of the remainder of the 15,113.5 square feet being covered by the building of the Boston Chamber of Commerce shown on said sketch.

It will be observed that the "locus," the land in question in this suit, is a triangular parcel of land lying between India Street, a public way, and Central Wharf Street, a private way, laid out as a public way on March 21, 1901, the base of the triangle abutting on a curved line a short distance in front of the building of the Chamber of Commerce.

It is important to note that the "locus" *does* lie *between* the public and the private way, *and that it never formed any part of either* until it was taken and laid out as a public way by the City of Boston, the defendant in error as hereinafter stated. It is also important to remember that said "locus," prior to said taking and laying out


STATE STREET
McKINLEY
U.S. CUSTOM HOUSE
SQUARE
STATE STREET BLOCK
CENTRAL STREET
CENTRAL WHARF STREET
Leading to Atlantic Avenue
Sidewalk
Locus 2955. Sq.Ft.
CHAMBER OF COMMERCE BUILDING
Sidewalk
MILK STREET
INDIA STREET
CUSTOM HOUSE STREET

for said way, had never been dedicated to the public in any way or manner (Record p. 9).

These are facts as to which there seems to have been some misapprehension on the part of the Massachusetts Courts. See opinion of the Supreme Judicial Court (Record, p. 24).

On said date of March 21, 1901, the petitioner, the Boston Five Cents Savings Bank, was the holder and owner of a mortgage on the whole lot owned by the Chamber of Commerce, viz., the 15,113.5 square feet, including the building of the Chamber of Commerce, and including also the "locus," but this mortgage was expressly subject to the reservation of rights above referred to, held by the petitioner, the Central Wharf and Wet Dock Corporation, so that on said date of March 21, 1901, the entire title to the "locus" stood in the Boston Chamber of Commerce, which owned the fee of it; the Central Wharf and Wet Dock Corporation, which owned the reservation of rights of way, light, and air in and over it; and the Boston Five Cents Savings Bank, which owned a mortgage on it, subject to said last-mentioned reservation; and on said date, to wit, on March 21, 1901, said three corporations, by uniting in a deed of it, could have conveyed the locus to a purchaser, giving him a free, clear and unencumbered title in fee simple.

On said March 21, 1901, the Board of Street Commissioners of the City of Boston, the defendant in error, duly and legally laid out said private way known as Central Wharf, or Central Wharf Street, from India Street to Atlantic Avenue—that is to say, for a long distance beyond the land in question in this suit—as a public way of said City, said laying out being made under the provisions of law authorizing the assessment of betterments; and as a part of said laying out took the area of 2,955 square feet which we have called the "locus" in this suit.

Said Board of Street Commissioners decided that the petitioners had sustained no damages from said taking, whereupon a cause of action against the City of Boston accrued to these petitioners (Mass. Rev. Laws, ch. 48, and especially Sects. 27, 94), to have their damages determined by a jury, and accordingly they began this suit. The suit was begun February 17, 1902 (Record, p. 5).

On February 26, 1903, said Board of Street Commissioners duly levied a betterment assessment for the laying out and construction of said street on the part of the property of the Chamber of Commerce

which had not been taken for said street, and also on property owned by the Central Wharf and Wet Dock Corporation not taken for said street.

The petitioners filed a stipulation in the case, in the Superior Court, that the damages might be awarded in a lump sum to all the parties interested as petitioners, and that such damages need not be apportioned among the petitioners by the jury in their verdict (Record, pp. 6, 7).

At the trial before the jury the petitioners offered evidence that the market value of the property taken was $60,000. This was all the evidence offered at the trial as to market value, although this fact is not very material in view of an agreement of the parties of record in the case (Record, p. 11) which follows:—

AGREEMENT OF PARTIES.

It was agreed by the parties at the trial "that if the law was substantially as stated in the petitioners' requests for rulings, damages were to be assessed for the petitioners in the sum of $60,000 without interest; and if *as matter of law* in the state of the title at the time of the taking, the petitioners were in no event entitled to full damages, estimating the same as if the land taken, were an entire estate and as if it were at the time of the taking, the sole property of one owner in fee simple, and if the evidence offered by the respondent was admissible and competent, and the law was substantially as stated in the respondent's requests for rulings, the petitioners' damages should be $5,000 without interest."

The petitioners asked the trial Court to rule and to instruct the jury (Record, pp. 9, 10):—

(1) That the damages were to be assessed as of the date of the order laying out the street, and that the only persons who could recover damages on account of such laying out were the persons interested in the land at the time; that as the petitioners together owned the entire title to the 2,955 square feet of land so taken for said street, and as they had filed in Court a stipulation that the damages might be awarded to the petitioners in a lump sum and were not to be apportioned between the petitioners by the jury, the

petitioners were entitled to recover the full fair market value of the land taken,—viz. $60,000.

(2) That the petitioners were entitled to recover the full fair market value of the land taken, estimating it as if it were an entire estate and as if it were the sole property of one owner in fee simple.

(3) That even if as matter of law the Central Wharf and Wet Dock Corporation was not entitled to recover any damages for or on account of said taking, then the other petitioners jointly, or the Chamber of Commerce alone, were entitled to recover the full market value of the property taken, estimating the same as if the land taken were at the time of taking the sole property of one owner in fee simple and unencumbered.

The petitioners also asked the Court to rule (Record, p. 11) that, if the statutes under which these proceedings were brought were to be construed as contended for by the respondent, or so as to deprive the petitioners of the right to recover the full fair market value of the property taken, the statutes as so construed would be unconstitutional under the Constitution of the United States, and particularly and especially under the Fourteenth Amendment to the Constitution of the United States, and they contended that such construction of the statutes was erroneous.

The respondent objected to said rulings asked for by the petitioners, and contended and asked the Court to rule that the damages were to be assessed as of the date of the order laying out the street and according to the condition of the title of the land at that time; that the owners of estates for whose possible or probable benefit the restrictions had been placed upon adjoining lands were not the owners of such interests in land as are entitled to damages under Chapter 48 of the Revised Laws, and asked the Court to rule that the taking for highway purposes did not take the fee of the land, but only imposed upon it an easement of public travel, and if the jury were of the opinion that when land in this vicinity was subject to a restriction so that it could not be built upon the only real advantage which came to the owners from its possession was that of light and air, and were of the opinion that light and air from the street would be just as valuable as the light and air from the open space; that, as the owners would be relieved by reason of the taking from paying taxes upon the land to be used for street purposes, they could find no damages, or such sum as they might think the Chamber of Com-

merce was entitled to by reason of the taking of this restricted land; that, in considering the question of the fair market value of the land taken and the damage, if any, to the remaining estate, they could take into consideration the probability or improbability of the Central Wharf and Wet Dock Corporation releasing its rights in said land, so far as such probability or improbability might affect the judgment of a possible purchaser.

The respondent offered to show, by the testimony of witnesses qualified to testify as to the fair market value of land in this part of the City of Boston, that as the land at the time of the passage of the order was owned by the Boston Chamber of Commerce, subject to the reservation and restriction that it could not be built on, which restriction was of great value to the Central Wharf and Wet Dock Corporation, the damage to the fair market value of the estate of the Boston Chamber of Commerce by reason of said street taking was little or nothing.

The petitioners objected to each and all of said rulings asked for by the respondent, and contended that such evidence was immaterial, incompetent, and inadmissible generally, and especially was immaterial and incompetent in this proceeding in which all the parties having any interest in the land taken, at the time of the laying out, had joined as petitioners, and had filed in Court a stipulation that damages might be awarded the petitioners in a lump sum without appointment between the petitioners, and was calculated to divert the minds of the jury from the real issue in the cause; and also was incompetent and inadmissible for the reason that the proposition contended for by the respondent and sought to be proved by such witnesses was not and could not be the subject of expert testimony, and that, even if said proposition could be the subject of expert testimony, the witnesses offered by the respondent, being qualified merely as experts on the value of real estate in this part of the City of Boston, were not qualified to testify upon the subject-matter of the respondent's contention.

The Court declined to rule as requested by the petitioners, and did rule that the evidence offered by the respondent as to the damages to the petitioners in the state of the title at the time of the taking was admissible, material, and competent, and also ruled that in the state of the title at the time of the taking the petitioners *as matter of law* were in no event entitled, nor were any one or more

of them entitled, to recover the full fair market value of the property estimated as if the property taken were free from all reservations and restrictions; ruled that the statute as so construed would not be unconstitutional either under the Constitution of Massachusetts or under the Constitution of the United States and *directed* a verdict for the petitioners for $5,000 without interest, which verdict was returned accordingly.

In lieu of exceptions by the petitioners the Court, under the Massachusetts practice, at the request of the parties, reported the case to the Supreme Judicial Court.

The terms of the report were as follows:—

If the rulings of the trial Court were right, judgment was to be entered on the verdict for $5,000 without interest.

If the substance of the rulings requested by the petitioners ought to have been given, *or* if the petitioners or any of them, in the state of the title at the time of the taking, were entitled to recover the full fair market value of the property taken, estimated as if the property taken were free from all reservations and restrictions, the verdict is to be set aside, and judgment is to be entered for the petitioners for $60,000 without interest.

This statement of the terms on which said report to the Supreme Judicial Court of the Commonwealth was made is a concise statement of the petitioners' claim in this case.

In other words, the petitioners contend that, inasmuch as they together owned the entire title to the land in question, no one else having any right, title, or interest therein, and inasmuch as the land taken had never been dedicated to any public use, they as such owners at the time of the taking were entitled to recover the full fair market value of the land taken at the time of the taking, of that which they had to sell at the time of the taking; and that, this being so, they were by virtue of the agreement of counsel in the case above set forth, and by virtue of the evidence in the case, entitled to recover the sum of $60,000 as such market value.

That by declining to rule as requested by the petitioners, by the rulings which it did make, and by the construction which it put upon the Massachusetts statutes under which this proceeding was brought, against the petitioners' express statement of their rights under the Constitution of the United States raised of record in the case (Record, p. 11) and by the Court's *direction* of a verdict for

$5,000, the Court deprived the petitioners of their property without due process of law, denied them the equal protection of the laws, and so enforced the statutes involved as to abridge the privileges and immunities of the petitioners, thereby raising a federal question within the jurisdiction of this Court.

This fundamental error is variously stated in assignments of error Nos. 1–11, inclusive, and in Nos. 13–17, inclusive (Record, pp. 13–20, inclusive), on all of which the petitioners rely.

There is also another error assigned (Assignment of Errors, Record, p. 18, No. 12) which relates to the admission by the trial Court of the evidence offered by the respondent, which evidence was as follows (Record, p. 10):—

> "The respondent offered to show, by the testimony of witnesses qualified to testify as to the fair market value of land in this part of the City of Boston, that as the land at the time of the passage of the order (*i.e.* the order laying out the street) was owned by the Boston Chamber of Commerce subject to the reservation and restriction that it could not be built on, which restriction was of great value to the Central Wharf and Wet Dock Corporation, the damage to the fair market value of the estate of the Boston Chamber of Commerce by reason of said street taking was little or nothing."

The errors assigned and relied upon by the petitioners (Record, p. 13) are as follows:—

Specification of Errors Relied upon.

1. The Court erred in said judgment and in the rendition thereof in this, that it ruled and decided as matter of law—against the express contention of the petitioners appearing of record in said cause—that the statutes of Massachusetts (Revised Laws, Chapters 48 and 50) were to be construed and enforced in such wise as to deprive the petitioners of all right to recover just, reasonable, and adequate damages for the taking from the petitioners by the right of eminent domain, and for a public use, and against the will of the petitioners, of land owned exclusively by the petitioners at the time of said taking; and also ruled that such construction and enforcement of said statute would not be and was not unconstitutional under the Constitution of the United States and the Fourteenth Amendment thereto, and

said judgment was based wholly and solely on said erroneous and unconstitutional ruling: whereas said Court ought to have ruled and decided in said judgment, in accordance with the contention of the petitioner's appearing of record in said cause, that such construction and enforcement of said statute would be and was unconstitutional under the Constitution of the United States and under the Fourteenth Amendment thereto; and that by force of said erroneous ruling and judgment the petitioners have been deprived of their property without due process of law and without just compensation, and have been denied the equal protection of the laws, in violation of the Constitution of the United States and of the Fourteenth Amendment thereto.

2. The Court erred in said judgment and in the rendition of said judgment in this, that, although it appeared of record in said cause, that land owned exclusively by the petitioners in said cause had been taken from the petitioners by the defendant, the City of Boston, for a public use, without the consent of the petitioners, and by the paramount right of eminent domain, whereby and by reason of said taking the petitioners in said cause, being the plaintiffs in error, became entitled to recover of said City just, reasonable, and adequate compensation for the land so taken, yet the Court in said judgment ruled and decided as matter of law, against the right of the petitioners to recover such just, reasonable, and adequate compensation for such land so taken, thereby denying to the petitioners the equal protection of the laws, and depriving them of their property without due process of law and without just compensation, in violation of the Constitution of the United States, and of the Fourteenth Amendment thereto.

3. The Court erred in said judgment and in the rendition of said judgment in this, that, although it appeared of record in said cause, that land owned exclusively by the petitioners in said cause had been taken from the petitioners by the defendant, the City of Boston, for a public way, without the consent of the petitioners, and by the paramount right of eminent domain, whereby and by force of which taking the petitioners had been deprived forever of all right to the beneficial use of said land, and could only use the same for the purposes of a way to the same extent only as the general public could use said land, and in common with the general public; and whereby and by force of which taking the petitioners became entitled in and

by these proceedings to recover of the defendant just, reasonable, and adequate damages for such taking, and these proceedings were the only proceedings which could be instituted by the petitioners for the recovery of such just, reasonable, and adequate damages, yet the said Court ruled and decided as matter of law in and by said judgment, against the right of the petitioners to recover such just, reasonable, and adequate damages for such taking, in these the only proceedings open to the petitioners for the recovery of such damages, thereby depriving the petitioners of their property without due process of law and without just compensation, and denying them the equal protection of the laws in violation of the Constitution of the United States and of the Fourteenth Amendment thereto.

4. The Court erred in said judgment and in the rendition of said judgment in this, that whereas it appeared of record in said cause that land owned exclusively by the petitioners in said cause had been taken from the petitioners by the defendant for a public use, without the consent of the petitioners, and by the paramount right of eminent domain, whereby the petitioners became entitled in and by these proceedings to recover just and adequate compensation for such taking, and whereas these proceedings were and are the only proceedings which could be instituted by the petitioners for the recovery of such compensation, and whereas it also appeared of record in said cause that such just and adequate compensation amounted in this cause to the sum of sixty thousand dollars, yet said Court ruled and decided as matter of law that the petitioners were only entitled to recover compensation for such taking based upon and limited by the use of said land taken which the petitioners were actually making at the time of such taking, and ruled and decided as matter of law that the petitioners were only entitled to recover as damages a sum much less than would be just and adequate compensation for such taking, thereby and by force of said decision depriving the petitioners of their property without due process of law, without just compensation, and denying them the equal protection of the laws in violation of the Constitution of the United States and of the Fourteenth Amendment thereto.

5. The Court erred in said judgment and in the rendition of said judgment in this, that, although it appears by the record of said cause that it was agreed by the parties to said cause, and found as matter of fact upon the record of said cause, that the land taken

by the respondent, at the time of the taking, was owned exclusively by the petitioners, the Boston Chamber of Commerce, one of the petitioners, owning the fee of said land subject to a mortgage held by the Boston Five Cents Savings Bank, also one of the petitioners, and the Central Wharf and Wet Dock Corporation, also one of the petitioners, owning easements of way, light, and air in and over said land secured to it by reservation in the deed of said land; that no other person or persons were interested in said land; that said land had never been dedicated to the public; that it was possible and practicable, apart from said reservation, for said Chamber of Commerce to extend its existing building over said land or to erect a new building on said land; that the fair market value of said land was sixty thousand dollars; and, although it appears of record in said cause that said land had been taken from the petitioners in said cause, by the respondent, by right of eminent domain, for a public use, to wit, for a public street or way in the City of Boston, without the consent of the petitioners, whereby and by force of said taking the said petitioners had been deprived forever of all beneficial use of said land, and whereby the petitioners became entitled to just and adequate compensation for such taking, under the Fourteenth Amendment to the Constitution of the United States; and, although the proceedings in said Court were and are the only proceeding which could or can be instituted to recover such or any compensation, yet said Court ruled and decided in said judgment as matter of law that said petitioners were not entitled, under said proceedings or in any proceedings, to recover as damages the fair market value of said property agreed, as above set forth, to be the sum of sixty thousand dollars, but were entitled, as matter of law, to recover only nominal damages, thereby and by force of said judgment depriving said petitioners of their property without due process of law and without just compensation, and denying them the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

6. The Court erred in said judgment and in the rendition of said judgment in that it ruled and decided in said cause, as matter of law, that said petitioner, the Central Wharf and Wet Dock Corporation, found in the record of said cause, at the time of the taking therein referred to, to be the owner of an interest in the land taken by virtue of a reservation contained in a deed of said land from

said Central Wharf and Wet Dock Corporation to the petitioner, the Boston Chamber of Commerce, was not entitled in this, the only proceeding open to it for the recovery of damages for said taking, to recover any compensation in damages for or on account of said taking, although said taking was made by the respondent by the right of eminent domain for the purpose of a public street or way of said City of Boston, and against the will of said Central Wharf and Wet Dock Corporation, and although by force of said taking said Central Wharf and Wet Dock Corporation was deprived of all its interest in and of the right to sell its interest in said land or to release its said interest in said land for a valuable consideration to said Boston Chamber of Commerce, or to have and enjoy any rights in said land except in common with the general public and as one of the public, and as limited and circumscribed by said taking, thereby depriving said Central Wharf and Wet Dock Corporation of its property without just compensation and without due process of law, and denying it the equal protection of the laws in violation of the Constitution of the United States and of the Fourteenth Amendment thereto.

7. The Court erred in said judgment and in the rendition of said judgment in that it ruled and decided, as matter of law, that the Boston Chamber of Commerce, one of the petitioners in said cause, was, as matter of law, entitled to recover only nominal damages for the taking by the respondent, by the paramount right of eminent domain and against the will of said petitioner, of land owned at the time of the taking by said petitioner, and was not entitled to recover as such damages the full fair market value of said land taken, which, as appears in the record of said cause, was the sum of sixty thousand dollars, although this proceeding for the recovery of damages was and is the only proceeding open to the said petitioner for the recovery of compensation for such taking, thereby deciding against the right of said petitioner to recover adequate damages for such taking and thereby depriving the said petitioner of its property without due process of law and without just compensation, and denying it the equal protection of the laws in violation of the Constitution of the United States and of the Fourteenth Amendment thereto.

8. The Court erred in said judgment and in the rendition thereof in that it ruled and decided, as matter of law, that all the petitioners,

whether jointly or severally, suffered no material damage by reason of the taking of their property by the respondent, by the paramount right of eminent domain, for a public way, and were not entitled to recover as damages either the full market value of the property taken, or even substantial damages for such taking, or any sum as damages in excess of nominal damages; although it appeared in said cause that the petitioners were the sole owners of said land at the time of said taking, that said land never had been dedicated to the public, that these proceedings were the only proceedings which could be instituted by the petitioners for the recovery of damages for such taking, and that said land at the time of said taking had a substantial market value of sixty thousand dollars, thereby and by force of said judgment depriving the petitioners of their property without just compensation and without due process of law, and denying them the equal protection of the laws in violation of the Constitution of the United States and of the Fourteenth Amendment thereto.

9. The Court erred in said judgment and in the rendition thereof in this, that it ruled and decided that the petitioners, whether jointly or severally, were entitled, as matter of law, to recover only such damages for the land taken as the petitioner, the Boston Chamber of Commerce, suing alone, could recover for the taking of said land, subject at the time of said taking to the easements and interests which the Central Wharf and Wet Dock Corporation had in said land, although it appeared in said cause that said land was taken by paramount right of eminent domain against the will of the petitioners; that the petitioners, together at the time of such taking were the sole owners of said land, that said land had never been dedicated to the public, and that these proceedings are and were the only proceedings open to the petitioners for the recovery of damages for such taking, thereby and by force of said judgment depriving the petitioners of their property without just compensation and without due process of law, and denying them the equal protection of the laws in violation of the Constitution of the United States and of the Fourteenth Amendment thereto.

10. The Court erred in said judgment and in the rendition of said judgment in this, that, although it appeared in the record of said cause that land owned exclusively by the petitioners had been taken by the respondent for a public way, by the paramount right of

eminent domain and without the consent of the petitioners, and that these proceedings were the only proceedings under the laws of Massachusetts whereby the petitioners could secure damages for such taking, and although it appeared in said record that the value of the land taken, if free from all reservations and restrictions, was sixty thousand dollars, and that the petitioners at the time of said taking owned said land free from all reservations and restrictions, or rights of any nature, public or private, yet said Court ruled and decided, as matter of law, that the petitioners were not entitled to recover as damages said value of said land, said sixty thousand dollars, thereby and by force of said judgment depriving the petitioners of their property without due process of law, and denying them the equal protection of the laws in violation of the Constitution of the United States and of the Fourteenth Amendment thereto.

11. The Court erred in said judgment and in the rendition thereof in this, that it ruled as matter of law, against the express contention of the petitioners appearing of record in said cause, that the statutes of the Commonwealth of Massachusetts under which these proceedings were brought (proceedings under which statutes were and are the only proceedings under the laws of said Commonwealth open to the plaintiffs in error to secure damages for land taken from the said plaintiffs by the respondent, by the paramount right of eminent domain, and the exclusive remedy of the said plaintiffs in the premises) were to be construed and enforced so as to deprive the plaintiffs of the right to recover as damages the full fair market value of the property taken, and ruled that such construction and enforcement of said statutes would not be unconstitutional under the Constitution of the United States or under the Fourteenth Amendment thereto: whereas said Court ought to have ruled and decided in said judgment, in accordance with the contention of the plaintiffs appearing of record in said cause, that such construction and enforcement of said statute would be and was unconstitutional under the Constitution of the United States and under the Fourteenth Amendment thereto, and that by force of said erroneous ruling and judgment the plaintiffs in error have been deprived of their property without due process of law, and have been deprived of their property without just and adequate compensation, and have been denied the equal protection of the laws in violation of the Constitution of the United States and of the Fourteenth Amendment thereto.

12. The Court erred in said judgment and in the rendition thereof in this, that it ruled, as matter of law, that the testimony of witnesses offered by the respondents to show "that as the land at the time of the passage of the order [of taking] was owned by the Boston Chamber of Commerce, subject to the reservation and restriction that it could not be built on, which restriction was of great value to the Central Wharf and Wet Dock Corporation, the damage to the fair market value of the estate of the Boston Chamber of Commerce by reason of said street taking was little or nothing" was admissible, material, and competent, against the objections of the petitioners, appearing on the record, that such testimony was inadmissible, immaterial, and incompetent generally, and especially was immaterial and incompetent in this proceeding, in which all the parties having any interest in the land taken at the time of the laying out had joined as petitioners, and had filed in Court a stipulation that damages might be awarded the petitioners in a lump sum, without apportionment between the petitioners, and was calculated to divert the minds of the jury from the real issue in the case; and also was incompetent and inadmissible for the reason that the proposition contended for by the respondent and sought to be proved by such witnesses was not and could not be the subject of expert testimony; and that, even if said proposition could be the subject of expert testimony, the witnesses offered by the respondent, being qualified merely as experts of the value of real estate in this part of the City of Boston, were not qualified to testify upon the subject-matter of the respondent's contention.

13. The Court erred in said judgment and in the rendition thereof in this, because said Court directed a verdict, and because said Supreme Judicial Court of the Commonwealth of Massachusetts ordered judgment on said verdict, which judgment was entered for the petitioners in the sum of five thousand dollars, without interest, in accordance with the erroneous rulings of law more particularly set forth in the preceding assignment of errors whereas said Court ought to have entered judgment for the petitioners in the sum of sixty thousand dollars, thus by such erroneous construction and enforcement of the above statutes taking the property of the petitioners without just compensation and without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, as herein more particularly set forth in the previous assignment of errors.

14. The Court erred in said judgment and in the rendition thereof in this, that, whereas it was agreed between the parties and appears on the record of this cause that, if the law was substantially as stated in the petitioners' requests for rulings, damages were to be assessed for the petitioners in the sum of sixty thousand dollars, without interest, said Court nevertheless declined to give the rulings requested by the petitioners, or the substance of said rulings, which rulings were as follows, to wit:—

(1) That the damages were to be assessed as of the date of the order laying out the street, and that the only persons who could recover damages on account of such laying out were the persons interested in the land at that time; that as the petitioners together owned the entire title to the 2,955 square feet of land so taken for said street, and as they had filed in Court a stipulation that the damages might be awarded to the petitioners in a lump sum and were not to be apportioned between the petitioners by the jury, the petitioners were entitled to recover the full fair market value of the property taken.

(2) That the petitioners were entitled to recover the full fair market value of the land taken, estimating it as if it were an entire estate and as if it were the sole property of one owner in fee simple.

(3) That even if, as a matter of law, the Central Wharf and Wet Dock Corporation was not entitled to recover any damages for or on account of said taking, then the other petitioners jointly, or the Chamber of Commerce alone, were entitled to recover the full market value of the property taken, estimating the same as if the land taken were, at the time of the taking, the sole property of one owner in fee simple and unencumbered.

15. The Court erred in said judgment and in the rendition thereof in this, that, although it was agreed by the parties and appears of record in said cause that, if the law was substantially as stated in the petitioners' requests for rulings, damages were to be assessed for the petitioners in the sum of sixty thousand dollars without interest; and if, as matter of law in the state of the title at the time of the taking, the petitioners were in no event entitled to full damages, estimating the same as if the land taken were an entire estate, and as if it were at the time of the taking the sole property of one owner in fee simple, and if the evidence offered by the respondent was admissible and competent, and the law was substantially as stated in the respondent's

requests for rulings, the petitioners' damages should be five thousand dollars without interest, said Court ruled and decided as matter of law that in the state of the title at the time of the taking the petitioners as matter of law were in no event entitled nor were any one or more of them entitled to recover the full fair market value of the property estimated as if the property taken were free from all reservations and restrictions, and that the statute as so construed would not be unconstitutional under the Constitution of the United States, and directed the jury to return a verdict for the petitioners for the sum of five thousand dollars without interest, and ordered judgment on said verdict: whereas said Court ought to have directed a verdict for the petitioners for the sum of sixty thousand dollars, and ought to have entered judgment for the petitioners for the sum of sixty thousand dollars.

16. The Court erred in said judgment and in the rendition thereof in this, that it declined to direct the jury to find a verdict in favor of the petitioners in the sum of sixty thousand dollars, without interest, and in that said Supreme Judicial Court refused to order that the verdict rendered be set aside and judgment entered for the petitioners in said sum of sixty thousand dollars, without interest, thus taking the property of the petitioners without due process of law and without just compensation, in violation of the Fourteenth Amendment of the Constitution of the United States.

17. That by said refusal to rule, as requested by the petitioners and by such construction and enforcement of the statutes under which these proceedings were brought, the property of the petitioners was taken without due process of law and without just compensation, in violation of the Fourteenth Amendment of the Constitution of the United States, which constitutional question was raised by the petitioners in said Superior and Supreme Courts, as duly appears on the record of this cause, was decided adversely to the contention of the petitioners, and was necessary to the decision of said case as rendered.

The Jurisdiction of this Court.

This is a case where the Supreme Judicial Court of Massachusetts has decided against the *right* of the petitioners to recover reasonable compensation for land taken from them by the exercise of the paramount right of eminent domain, and thus has denied them the equal

protection of the laws, and has deprived them of their property without due process of law.

It is not a case in which the Massachusetts Court has merely decided against a particular form of *remedy*, but is a case where the Massachusetts Court has denied the petitioners *all* remedy.

For, under the laws of Massachusetts, as construed from the earliest times, with absolute uniformity, the sole and exclusive remedy of the petitioners for the recovery of compensation for the land taken from them by the respondent in this case was by the petition under the statute which the petitioners filed in this case.

There is no other process or proceeding by which, under Massachusetts law, the petitioners can recover compensation for the land taken. A petition under the statute (Mass. Rev. Laws, Ch. 48) is the sole and exclusive remedy of the land-owner, whose land is taken for a public way.

Hull v. *Westfield*, 133 Mass. 433, 434.

This was an action of tort for the conversion of gravel, wood, and logs. The defendant justified under an act of the Legislature (Mass. St. of 1879, Ch. 150) which authorized the defendant town to locate and construct a dike. In digging for the dike, the town removed gravel on land of the plaintiff, within the limits of the location, and it was held, that for such removal an action would not lie, because the remedy given by the statute which authorized the location of the dike was exclusive.

The Court said (p. 434):—

> "Upon these facts it is clear that this action cannot be maintained. The case falls within the well-established rule that where the Legislature authorizes a work for public use, and the work thus authorized is executed in a reasonably proper and skilful manner, any damage necessarily caused to any person by taking his property can be recovered only in the manner pointed out by the statute."
>
> "The acts complained of in this case were done under the authority of the public, in the exercise of the right of eminent domain; they were legal and right; and the plaintiff's exclusive remedy is by an application for a jury under the statute."

This has been the law in Massachusetts from the earliest times.

See *Stevens* v. *Proprietors of Middlesex Canal*, 12 Mass. 465, which holds that,

> "Where the Legislature authorizes the making of a canal, and provides a special mode of redress for those who are injured in their property by the natural and necessary effect of making the canal, no action for such injury lies at the common law."

See also *Stowell* v. *Flagg*, 11 *Mass.* 364.
Boston Belting Co. v. *Boston*, 149 Mass. 44.
Gedney v. *Tewksbury*, 3 Mass. 306, 307.
Peterson v. *Waltham*, 150 Mass. 564.

In *Boston Belting Co.* v. *Boston*, 149 Mass. 44, the Court (p. 45) lays down the rule as follows:—

> "Where a city or town is authorized by the Legislature to make a public improvement which must result in injury to the property of citizens, and the statute makes provision for ascertaining the damages for such injury under special proceedings, the remedy thus provided is exclusive of all others, and the citizen cannot maintain an action at law for any injury which is within the scope of the remedy provided by the statute.
> But if injury is done which is not the necessary result of the public work authorized by the Legislature, but is caused by the unskilful and negligent manner in which the work is done, the person injured may maintain an action at law for such injury."

In *Peterson* v. *City of Waltham*, 150 Mass. 564, the Court said:—

> "This is an action of tort to recover damages for the taking of the plaintiff's land and laying out streets over it, in Waltham." . . .
> "No action will lie for taking land for public ways in the manner prescribed by statute." "The only remedy for a person aggrieved is the petition provided for by the statute."

The Court of first instance in this case allowed an amendment changing the action at law into a petition for damages under the statute, and the question was whether such an amendment could be allowed; it was held that it could not be allowed, for the reason that, if the Court could ever allow an amendment changing an action

of tort into a petition for damages under the statute, it could not (as was done by the lower Court in this case) allow such an amendment after the expiration of the time limited by the statute for the bringing of a petition.

The case at bar is a petition brought under Mass. Rev. Laws, Ch. 48, Sect. 20. (See opinion of Mass. Supreme Judicial Court, Record, p. 23.)

This section and sections 21 and 22 of said chapter which are also material (see Record, p. 24) are as follows:—

> "SECTION 20. If there are several parties, who have several estates in the same property at the same time, other than the estates and interests for which provision is made in section seventeen, and the property is taken or damaged, in whole or in part, by laying out, relocating, altering or discontinuing a highway, or by making specific repairs thereon, and one of such parties applies for a jury to ascertain his damages, the other parties may become parties to the proceedings under such petition, and the damages of all of them may be determined by the same jury, and in the manner provided in the four following sections.
>
> SECTION 21. Upon such application, the commissioners shall order the petitioner to give notice thereof to all the other parties interested, by serving each of them, fourteen days at least before their next regular meeting, with an attested copy of such application and the order thereon, that the other parties may appear at the next meeting and become parties to the proceedings under the application; and at the next meeting a jury shall be ordered, and shall hear all parties to the proceedings.
>
> SECTION 22. If, on such hearing, the jury find any of the parties entitled to damages, they shall first find and set forth in their verdict the total amount of damages sustained by the owners of such property, estimating the same as an entire estate and as if it were the sole property of one owner in fee simple; and they shall then apportion such damages among the several parties whom they find to be entitled thereto, in proportion to their several interests and to the damages sustained by them, respectively, and set forth such apportionment in their verdict; and if they find that any party has not sustained damage, they shall set forth in their verdict that they award him no damages."

These sections in substantially the same language have been in force since 1836, and how much longer we have not thought it necessary to inquire.

During all these years these statute provisions have been sufficient in form and substance to enable all persons in Massachusetts to recover all the compensation rightfully due them, where their land has been taken for a public way.

They apply exactly to the facts of the case at bar, yet the Massachusetts Court has so enforced these statutes in the case at bar as to deprive the petitioners of their constitutional rights.

It is established by this Court that the prohibitions of the Fourteenth Amendment extend to "all acts of the state, whether through its legislative, its executive or its judicial authorities."

Chicago, Burlington & Quincy R. R. v. *Chicago*, 166 U. S. 226, 234.
Scott v. *McNeal*, 154 U. S. 34.
Ex parte Virginia, 100 U. S. 339, 346-347.
Neal v. *Delaware*, 103 U. S. 370-397-398.
Raymond v. *Traction Co.*, 207 U. S. 20.
Fayerweather v. *Ritch*, 195 U. S. 276, 297.

In *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U. S. 226, this Court said (p. 234):—

> Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defence.
>
> "It is true that this Court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the Court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law, *United States* v. *Cruikshank*, 92 U. S. 542, 554; *Leeper* v. *Texas*, 139 U. S. 462, 468. But a state may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the Courts and give parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining

what is due process of law regard must be had to substance, not to form. This Court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which by its own legislation, it chooses to declare such?'

To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. *Davidson* v. *New Orleans*, 96 U. S. 102.

The same question could be propounded, and the same answer should be made in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of the Amendment."

And again on page 236:—

"The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

On page 241 this Court said:—

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument." . . .

"The owner of private property taken under the right of eminent domain obtains just compensation if he is awarded such sum as under all the circumstances is a fair and full equivalent for the thing taken from him by the public."

See also *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–374.
Gibson v. *Mississippi*, 162 U. S. 565, 582, 583, 584.
Backus v. *Fort Street Union Depot Co.*, 169 U. S. 557.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, this Court said, page 373,

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, the Court said, page 565:—

> "It is also not open to further debate since the decision in *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U. S. 226, that this Court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so as to inquire whether that Court prescribed any rule of law in disregard of the owner's right to just compensation."

And see *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, where Mr. Justice Holmes, speaking for this Court, says,—

> "If the statutes are constitutional as construed, we follow the construction of the state Court."

See also *Kies* v. *Lowery*, 199 U. S. 233.

If the statute is fair on its face and provides a tribunal and a process for the recovery of just and reasonable compensation, and the tribunal provided by the statute denies and withholds reasonable compensation, the quarrel of the land-owner is not with the statute, but with the enforcement of it by the tribunal; and if the remedy given by the statute is ample and sufficient, but the tribunal denies the remedy, such tribunal cannot defend itself in this Court by saying that it was merely construing a state statute.

If the decision of the state court had been that by the true construction of the statute our remedy was a different one from the one we were pursuing, we should have been remediless in this Court; but when the denial of the state court is of all right in any proceeding to recover just compensation (which is the situation here), then, under the decisions of this Court above cited, the rule that the construction of a state statute is for the state court has no application.

In *Insurance Co.* v. *The Treasurer,* 11 Wall. 204, which was a mandamus proceeding under a statute which provided, where a tax had been decided to be illegal, that the treasurer should give a certificate of indebtedness for the amount of tax paid, this Court said, page 209:—

> "Had the state Courts decided against the *right* of the plaintiff and had it so appeared by the record, the jurisdiction of this Court would have attached to the case. But that does not appear. It only appears that they have decided that the plaintiff has no *remedy* under this statute. Its right to recover the illegal tax is undisputed, but not to recover it in this way."

The italics in the above citation are not ours, but are in the opinion of the Court.

In the case at bar the right of the petitioners to recover just compensation is indisputable, and it is also clear that under the laws of Massachusetts their right to recover such compensation under this proceeding is indisputable, since this proceeding is the only proceeding under Massachusetts laws provided to the exclusion of all other proceedings for the recovery of such compensation in such cases as the present case.

In the case at bar the evidence offered by the petitioners was that the fair market value of the land taken was $60,000 (Record, p. 10). This was the only evidence in the case tending to show the market value of the land taken, as the respondent failed to offer any evidence on the question of the market value of the land taken, contenting itself with offering testimony in support of its contention that, by reason of the way in which the title of the petitioners to the land was held, the petitioners, as matter of law, were not entitled to recover the full value of the land taken (Record, p. 10).

It follows then, from this absence of any evidence to control the evidence offered by the petitioners, as well as from the agreement of the parties (Record, p. 11), that, if the petitioners were entitled to recover the fair market value of the land taken, they were entitled to recover $60,000, and were entitled to judgment for that amount, and were not to be put off with the judgment for $5,000 which was all that was allowed them by the Court.

This is not a case where the amount of the damages which the petitioners were entitled to recover was submitted to a jury upon

evidence as to the amount, offered by the one side and the other it is not a case of the submission to a jury, and a determination by a jury, of the mere *quantum* of damages.

Such a case would present no question of law. Still less would it present any federal question which this Court could entertain.

It is a case where it was agreed by the parties by an agreement made in open Court at the trial of the cause (Record, p. 11), in substance, that, if the petitioners' title to the land taken was such as would entitle them to recover full damages, such damages as the ordinary owner in fee simple of land ought to recover, judgment was to be entered for the petitioners for $60,000, and is a case where the Court did not submit to the jury the determination of the *quantum* of damages with instructions how they were to arrive at the true measure of damages, but *ruled as matter of law* (Record, pp. 11–12) "that in the state of the title at the time of the taking the petitioners *as matter of law* were in no event entitled, nor were any one or more of them entitled, to recover the full fair market value of the property estimated as if the property taken were free from all reservations and restrictions," and ruled "that the statute as so construed would not be unconstitutional either under the Constitution of Massachusetts or under the Constitution of the United States, and *directed* a verdict for the petitioners for $5,000 without interest," which was returned accordingly, and at the request of the parties reported the case to the Supreme Judicial Court of the Commonwealth.

The terms of said report were these:—

If the rulings were right, judgment was to be entered for the petitioners on the verdict for $5,000 without interest.

> "If the substance of the rulings requested by the petitioners ought to have been given, or if the petitioners or any of them in the state of the title at the time of the taking were entitled to recover the full fair market value of the property taken estimated as if the property taken were free from all reservations and restrictions, the verdict is to be set aside, and judgment is to be entered for the petitioners for $60,000 without interest" (Record, p. 12).

The Supreme Judicial Court decided, as appears by its opinion (Record, pp. 22–26), that the rulings of the trial Court were right, and ordered judgment on the verdict, and judgment was accordingly entered for the petitioners for $5,000 (Record, pp. 12–13).

It was the intention of the parties to raise on the record and they did raise on the record, the proposition of law that, under the Constitution of the United States and the Fourteenth Amendment thereto, the petitioners who together owned the entire title to the land taken, *free of all reservations and restrictions, the land taken never having been dedicated to the public*, were entitled as matter of law to recover the same *quantum* of damages as any single owner of the land taken would have been entitled to recover, namely, $60,000, which was the full fair market value of the land taken, and this contention was distinctly denied by the trial Court (Record, p. 11), and the ruling of the trial Court was sustained by the Supreme Judicial Court for the Commonwealth.

On the federal question and the question of jurisdiction the case comes squarely within the decision of this Court in *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U. S. 226, and the fact that, instead of a judgment for the petitioners for one dollar, a judgment for $5,000 was by the agreement of the parties (Record, p. 11) entered for the petitioners, does not differentiate that case from the case at bar.

The fact remains that the Court by its judgment denied, *as matter of law*, the *right* of the petitioners to recover the full measure of compensation guaranteed them by the Federal Constitution against the contention of the petitioners squarely raised upon the record (Record, p. 11), and, this being so, a federal question is presented which gives jurisdiction to this Court, and the State Court has it not in its power to deprive the petitioners of their right to resort to this Court for protection in the rights guaranteed to them by the Constitution of United States, by entering a judgment in the petitioners' favor for a sum in excess of nominal damages, but which falls far short of that measure of compensation which the Constitution guarantees them.

If it should appear that the Constitution of the United States, as applied to the facts of a particular case, guaranteed the petitioners a measure of compensation for property taken from them by eminent domain amounting to $60,000, the right of the petitioners to resort to this Court to secure that full measure of compensation is not to be taken from them by the trial Court which denies their constitutional right, by the expedient of giving them damages, which, while not literally perhaps nominal damages, are yet only one-twelfth of the sum to which, under the Constitution, they are entitled.

Nor is the fact that the parties have agreed that such a course may be pursued, in the event of the decision of the cause being that the petitioners are not entitled, under the Constitution of the United States, to damages in the larger sum which they have claimed, a bar to their right to litigate the constitutional question in this Court.

The agreement of the parties (Record, p. 11) was as follows:—

> "It was agreed that if the law was substantially as stated in the petitioners' requests for rulings, damages were to be assessed for the petitioners in the sum of $60,000 without interest, and if as matter of law in the state of the title at the time of the taking, the petitioners were in no event entitled to full damages, estimating the same as if the land taken were an entire estate and as if it were at the time of the taking the sole property of one owner in fee simple, and if the evidence offered by the respondent was admissible and competent, and the law was substantially as stated in the respondent's requests for rulings, the petitioners' damages should be $5,000 without interest. But the petitioners contended and asked the Court to rule that if the statutes under which these proceedings were brought were to be construed as contended for by the respondent, or so as to deprive the petitioners of the right to recover the full fair market value of the property taken, the statutes as so construed would be unconstitutional under the Constitutions of the Commonwealth and of the United States of America, and particularly and especially under the Fourteenth Amendment to the Constitution of the United States of America, and they contended that such construction of the statutes was erroneous" (Record, p. 11).

It is a fair inference from the opinion of the Supreme Judicial Court of Massachusetts that, but for this agreement of the parties of record in the cause, the judgment for the petitioners in this cause would have been a judgment for the nominal sum of one dollar; but, however that may be, the fact remains that the judgment for $5,000 was entered because the right of the petitioners to the full measure of damages claimed by them was denied by the Court, and it then followed under the agreement of the parties that judgment was to be entered for the petitioners for $5,000.

But it is to be noted that the judgment for $5,000 was to be entered *only* if the law is such that the petitioners are not entitled to judgment in the larger sum; and until it has been determined by this Court, as the Court of last resort, that under the Constitution of

the United States the petitioners are not entitled to the larger sum, there is no authority under the agreement to enter a final judgment for the smaller sum.

The trial Court being directed thereto, by the highest Court of the State, entered judgment as it was bound to do, acting under such direction, for the sum of $5,000, but the fact that it did so cannot operate to prevent the petitioners from taking the case to this Court, which is the proper tribunal finally to decide the question of law involved, because the petitioners have the right under the Constitution of the United States to a determination by this Court of the question whether the law is as the State Court has determined it to be as a condition precedent to the entry of a final judgment for the petitioners in the smaller sum.

In other words, the question whether judgment should be entered for the petitioners for $60,000 or for $5,000 is the very question at issue between the parties in this cause. That question is purely a question of law; and because it involves a question of the rights guaranteed the petitioners by the Federal Constitution, and because the rights which they claim under the Constitution have been denied them, it is a question for the determination of this Court.

The fact that the respondent has agreed that, if the petitioners' claim to recover full compensation cannot be sustained as matter of law, they may take a judgment for one-twelfth of that full measure of compensation, when the facts of the case are such that, if the petitioners should not be sustained by the judgment of this Court in their contention, they might, but for the respondent's agreement, have been entitled only to a judgment for nominal damages, cannot operate to prevent the petitioners from taking the judgment of this Court on the only question involved in the cause; namely, whether they are entitled as matter of law to judgment for the larger sum.

Until this Court as the Court of last resort has decided that the petitioners are not entitled to judgment for the larger sum, the occasion for the entry of a final and definitive judgment that the petitioners are to recover only $5,000 has not arrived.

We have dwelt upon this point more than its importance would seem to warrant, simply because the agreement of the parties was a somewhat unusual one, and it seemed to us that there was some danger that the facts with regard to it might be misunderstood by the Court to our injury,—that it might be supposed by this Court that the jury,

acting under proper instructions to which no exception was taken, had decided a pure question of fact, and that, therefore, this Court had no jurisdiction of the case. It will be seen that such is not the fact. Indeed, the reason for the making of the agreement for the entry of a judgment for the petitioners for $5,000 in the event of a decision adverse to the petitioners' contention, by the highest tribunal to which the petitioners might see fit to apply for a decision of the question, namely, by this Court, though not stated in terms upon the record, is yet sufficiently apparent to any person familiar with Massachusetts laws.

In Massachusetts public ways are laid out in one of two ways, either under the general highway laws, so called (R. L., Ch. 48), or under the betterment laws, so called (R. L., Ch. 50).

When a public way is laid out under the general highway laws, the jury, in awarding damages to the land-owner, is required to deduct from the damages sustained by the land-owner all direct and special benefits to his remaining land, if any, not taken for the way, accruing from the laying out of the way. Such direct and special benefits are set off against the damages, and the verdict of the jury is returned for the net amount of damage remaining after such deduction.

But, when a way is laid out under the betterment laws, so called, the law provides that in determining the damages there shall be no deduction whatever for benefits, and full damages without any set-off are awarded to the land-owner.

Then, after the way is constructed, the benefits which would in the case of a way laid out under the general highway act have been deducted from the damages are, under the betterment law, separately assessed, and provision is made for the determination of the justice of the assessment by proceedings independent of the proceedings for the recovery by the land-owner of his damages.

The way in question in this case was laid out under the betterment laws, and betterments were assessed upon the petitioners (Record, p. 9).

Benton v. Brookline, 151 Mass. 250, 262.

Now it seemed clear, even to the learned counsel for the City of Boston, the advocate of the defendant in error, that to take our land valued at $60,000 and to pay us nothing for it, and then to levy

a betterment upon us for so doing, was a little more than even he would consider reasonable.

Hence the agreement for judgment in the petitioners' favor for $5,000 in case it should be determined by this Court that we are not entitled to $60,000, but are entitled only to nominal damages.

One other fact in the history of the case, though it has no bearing on the question of the jurisdiction of this Court, for the convenient understanding of the case, may well be set forth here.

Section 22 of Mass. Rev. Laws, Chapter 48, under which statute this petition for damages was brought, which section has been hereinbefore recited at length, provides in substance that, in a case like this case, brought under Section 20, where there are "several parties who have several estates in the same property at the same time," (see Mass. Rev. Laws, Ch. 48, Sect. 20), if, on the hearing, "the jury find any of the parties entitled to damages," "*they shall first find and set forth in their verdict the total amount of damages sustained by the owners of such property, estimating the same as an entire estate, and as if it were the sole property of one owner in fee simple.*"

The same section then goes on to provide an equitable method of apportioning, between two or more petitioners who have several estates in the property taken, their respective shares in such damages.

This last provision is obviously solely for the benefit of petitioners who cannot agree among themselves as to the division among themselves of the "total amount of the damages," which must first be determined by the jury, and the performance of this function by the jury may well be waived by petitioners who can agree upon the division of the "total amount of damages," among themselves, since such waiver cannot affect the question of the "total amount of the damages," which must first be ascertained, and which is the only question which interests the respondent.

In this case the petitioners did agree upon the division of the "total amount of damages" among themselves, and by a stipulation filed in the cause (Record, p. 9), to which all the petitioners were parties, agreed of record to waive the apportionment of the damages among themselves by the jury.

This explains why, in this case, the procedure provided in Mass. Rev. Laws, Ch. 48, Sect. 22, was not fully carried out.

ARGUMENT.

The market value of the "locus," the land taken for this street at the time of the taking, was $60,000.

This was established by the evidence offered by the petitioners (Record, p. 10), which was the only evidence in the case upon this question, and by the agreement of counsel (Record, p. 11).

Consequently, the owners in fee simple of the land unencumbered were entitled to recover in this proceeding $60,000.

The same result would have been true whether there were one owner or a dozen or more owners.

The fact that there were a dozen or more owners, widely scattered and of widely divergent opinions as to the desirability of selling, cannot affect the market value of the land.

Suppose there were two owners, and one of them wished to sell and the other did not.

Would that affect the market value of the land? Would it affect the market value of the land if there were one owner and he was unwilling to sell?

Such a proposition is absurd on its face.

If the unwilling owner were persuaded to sell or if he were compelled to sell by process of law, the land would sell for what it was worth; in other words, for its market value.

So in the case of different owners of different estates or interests in the land.

If one has a life estate in land and another owns the remainder, the market value of the land is the same as if the latter owned the entire title.

If one has a mortgage on a parcel of land and another owns the equity of redemption, the market value of the land is the same in either case.

It cannot be that the fact that there were different owners of different estates in this land operated to make the market value of the land—the worth of the land—anything different from what it would have been if there had been but one owner.

What, then, remains of the contention of the respondent?

Obviously, nothing remains except the contention that at the time of the taking the petitioners were using this land not as part

of a street or way, it is true, but as vacant land, keeping it lying open and unbuilt upon; and that, inasmuch as the City of Boston, though it took the land away from the owners and deprived them forever of all right to make any beneficial use of it, and of all right to sell it to others who might wish to put it to some beneficial use, and who would pay for that right,—inasmuch as the City of Boston by its taking dedicated the land for all time to a use similar to the use which the petitioners were in fact making of it at the time of the taking, therefore the petitioners had sustained no damages, and this land, which, it is admitted, was worth $60,000, may be taken by the city without the payment of anything more than nominal damages therefor.

This line of argument proceeds upon the fallacy long since exploded in this Court (*Boom Company* v. *Patterson*, 98 U. S. 403) that, in determining the damages sustained by an owner of land taken by eminent domain, the use which the land-owner at the time of the taking happens to be making of his land is the only thing to be considered.

The fact is that the use which the owner of the land taken is making of the land at the time of the taking is absolutely and wholly immaterial.

Imagine the common case of a man of advanced years who has lived all his life on one parcel of land in a city which has grown until the street where he lives is all given over to business purposes and the land has therefore become very much enhanced in value. Unwilling to move, he holds on until the city takes his land for a street or for some other public purpose. Is he to be limited in his suit for damages to the recovery of the value of the land for dwelling-house purposes, because he was in fact using it for such a purpose at the time of the taking, when the land has ceased to be of any value for dwelling-houses and is of value only for business uses?

The statement of such a proposition is its own refutation.

In *Boom Co.* v. *Patterson*, 98 U. S. 403, 407, 408, this Court said:—

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties.
>
> The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the use to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is its

worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the immediate future."

Knowlton, C. J., in *Maynard* v. *Northampton*, 157 Mass. 218, 219, says:—

"In determining the damages in cases of this kind the jury should consider not only the value of the property taken, but also the effect of the taking upon that which is left; and in estimating the value of that which is taken they may consider all the uses to which it might properly have been applied if it had not been taken. In like manner, the effect on that which is left should be estimated in reference to all the uses to which it was naturally adapted before the taking. *Damages are not to be awarded in reference to the peculiar situation or circumstances or plans of the owner, or to the business in which he happens to be engaged; but any and all of the uses to which the land considered as property may profitably be applied, whether contemplated by the owner or not, may well be taken into the account by the jury.*"

In *Eastern R.R.* v. *Boston & Maine R.R.*, 111 Mass. 125, 132, the Court said:—

"In estimating the value of the land taken the jury would certainly have the right to consider the profitable uses of every kind to which it could be applied, and must take into account its proximity to the stations of two great lines of railroad communication, terminating at tide water within the limits of the city."

To the same effect are the cases of

Providence, etc., R.R. v. *Worcester*, 155 Mass. 35.
Conness v. *Commonwealth*, 184 Mass. 541.
Fales v. *Easthampton*, 162 Mass. 422, 425 (citing *Boom Co.* v. *Patterson*, 98 U. S. 403).

It will be seen, then, that the right of the petitioners to recover the fair market value of the land taken is not lost because of the fact that there is more than one owner, nor by reason of the fact that the entire title is held by different owners who own different interests, nor because of the fact that at the time of the taking the petitioners were making a use of the land similar in kind to the use which the city intended by its taking, to make of it.

But it is contended, because of the way in which the title was held, neither the Central Wharf Corporation nor the Chamber of Commerce, acting alone and without the co-operation of the other, could, at the time of the taking, have conveyed a clear title to the land in fee simple, free of all encumbrances, and that therefore neither of them, if suing alone, could have recovered full damages, and that consequently both of them, suing together, must be limited to the recovery of nominal damages.

This is a complete *non sequitur*.

Such a contention seems almost incredible.

Such a contention would apply equally well where one man owned a life estate and the other man owned the remainder in fee subject to the life estate.

Neither without the co-operation of the other could convey a clear title to the whole estate.

Yet both suing together could recover the full value of the fee.

Edmands v. *Boston*, 108 Mass. 535.

Such a contention is best met by supposing that the Central Wharf and Wet Dock Corporation and the Chamber of Commerce were permitted by the statute to bring separate petitions and had brought them.

In that case the Chamber of Commerce would have been entitled to recover the fair market value of the property after deducting from that amount the value of the interest of the Central Wharf and

Wet Dock Corporation in the land taken; and, in the case of the petition of the Central Wharf and Wet Dock Corporation, that corporation would have recovered the fair market value of its interest in the land. The amount of the two recoveries would equal the fair market value of the land.

The same result would follow if one of the petitioners held a life estate and the other the remainder in fee.

If, in the case which we have supposed, the value of the interest of the Central Wharf and Wet Dock Corporation was little or nothing, so much the greater would be the amount of the award to the Chamber of Commerce and *vice versa*.

In any event the total amount to be paid by the respondent would not be greater nor less than the market value, in theory at least.

But in practice it was found that, where parties having different interests brought separate petitions before different juries, there was danger that these different juries, not having the whole case before them, might unduly enhance the damages of each petitioner, and thereby subject the respondent to pay to the two suing separately more than the fair market value of the land taken, and hence the passage of the statute requiring them to join in one suit, and requiring the jury first to find the entire amount of damages, and then to apportion them among the claimants.

The statute was not intended to be used so as to prevent the recovery of full damages; *i.e.*, the fair market value of the land taken. It was only intended to prevent the recovery of more than the fair market value.

The respondent evidently sees the difficulty under which it labors in its endeavor to secure land worth $60,000 for nothing, for in its requests for rulings it asks for a ruling "that the owners of estates for whose possible or probable benefit the restrictions [meaning the reservation in the deed of the Central Wharf and Wet Dock Corporation] had been placed upon adjoining lands, were not the owners of such interests in land as are entitled to damages under chapter 48 of the Revised Laws," and in the same breath offered to show "that as the land at the time of the passage of the order was owned by the Boston Chamber of Commerce, subject to the reservation and restriction that it could not be built on, *which restriction was of great value to the Central Wharf and Wet Dock Corporation*, the damage

to the fair market value of the estate of the Boston Chamber of Commerce by reason of said street taking was little or nothing."

Here are two contentions about as inconsistent and inequitable as could well be imagined.

This contention reminds us of the case of the man who was sued for the digging of the cellar for a new house which he was constructing, and defended upon the ground that the cellar had been made too large for the frame of the house. When sued for the construction of the frame of the house, he set up that the frame had been made too small to fit the cellar.

The respondent's grievance seems to be that the statute requiring different owners to join in one petition, which obviously was intended for its benefit, to prevent its being called upon to pay more than the fair market value, is a stumbling-block in the way of its attempt to get land worth $60,000 for nothing.

The respondent's theory seems to be that, if it could only compel these petitioners to sue in different proceedings in different arenas, it could play off one owner against the other, and so secure for a nominal sum land worth $60,000. In other words, secure the frame of the house and the cellar without paying anything for either.

The Massachusetts Court, as it seems to us (and we say it with all possible deference to that Court), also misapprehended the facts of the case.

The Court says in its opinion (Record, p. 24):—

> "The difference between the contentions of the parties, as we understand them, may be illustrated as follows: Suppose that B owns a tract of land between two parallel streets thirty rods apart, in a rapidly growing city. Suppose that he locates a private street four rods wide through his land, connecting the two streets, and lays out building lots three rods wide on each side of it, and sells each lot to a purchaser, bounding him on the side of the private street, and giving him a right to use it as a street, while he retains the fee in himself. Suppose that a dwelling house is erected by each purchaser on his lot and the city then lays out the private street as a public street, and a petition is brought, in which B and the twenty lot owners join for the assessment of damages. A hearing is had upon the petition. Under the R. L. c. 48, s. 22, which is relied on by the present petitioners, 'if on such hearing the jury find any of the parties entitled to damages, they shall first find and set forth in their verdict the total amount of damages sustained

by the owners of such property, estimating the same as an entire estate, and as if it were the sole property of one owner in fee simple, and they shall then apportion such damages among the several parties whom they find to be entitled thereto, in proportion to their several interests, and to the damages sustained by them respectively, and set forth such apportionment in their verdict, and if they find that any party has not sustained damage, they shall set forth in their verdict that they award him no damages.' It is obvious, in the case supposed, that no one of the lot owners suffers any damage; for the public easement taken by the authorities leaves every abutter with as advantageous rights to use the public street as he had before to use the private street. B suffers no substantial damage; for he still remains the owner of the fee of the street, and the public easement that is taken from him only extends to the general public the same right to use the street which twenty house owners and the persons coming to their houses had before. Besides, the city assumes the burden of keeping the street in repair. According to the contention of the petitioners in this case, these twenty-one persons who own rights in the private street, which, if united, would make a perfect title in fee simple, can recover as damages, under their petition, the fair market value of the one hundred and twenty square rods of land included in the taking, estimated as if it were the property of a sole owner, free from all restrictions or incumbrances, ready for use for building lots or for any other purpose. Such a startling result compels a careful scrutiny of the statute to discover its true meaning."

In other words, the Court assumed that this case was to be decided as if the "locus" at the time of the taking formed a part of the private way known as Central Wharf Street, and was subject to rights of passage over it belonging to an indefinite number of persons.

Now, although it is not the law in Massachusetts that the owner of the fee of a private way which is subject to private rights of way owned by many abutting lot owners is only entitled, when the private way is laid out as a public way, to recover nominal damages (see *Beale* v. *Boston*, 166 Mass. 53, in which case it was held that the owner of such an estate was not limited to the recovery of nominal damages), yet for the sake of the argument we might perhaps safely admit that the decision of the Massachusetts Courts would have been correct if this land in question in this suit had formed a part of a street at the time of the taking, even if it had formed part only of a private

street, and had been given up and dedicated to street purposes by the owner for the purpose of enabling him to sell lots abutting thereon, *and* if this were a proceeding brought to recover damages for the taking of the private way for a public street in which the owner of the fee and all the lot owners owning rights of way had joined as petitioners, *and if in such proceeding it appeared in evidence* that the lot owners could not in fact ever give up their rights of way over the private way, and unite with the owner of the fee in a sale of it for other uses, as, for instance, to be built upon, without destroying all access to their several lots and sacrificing vastly more in so doing than they would receive by selling the land covered by the private way.

But the point is that this case is not that case. The locus never did form a part of any way, public or private. "Said land taken had never been dedicated to the public, but was at all times kept in order and repair by said Chamber of Commerce" (Record, p. 9).

No one owned any rights in it but the three petitioners, and they together owned the entire title.

> "At the time of said laying out and of said taking, no party or person had any interest in the land taken except said Boston Five Cents Savings Bank, which had an interest as mortgagee as aforesaid; the Central Wharf and Wet Dock Corporation, which had the interests, rights and estates reserved to it by said deed; and the Boston Chamber of Commerce, which owned the fee of the land taken, subject to said mortgage held by the said Savings Bank, and subject also to the rights in the land taken which were reserved in said deed from said Wharf Corporation, and all said parties are petitioners for damages in this action" (Record, p. 9).

Therefore, the assumption made by the Massachusetts Court that this case was to be decided upon the theory that the land taken formed a part of a private way, and had been dedicated irrevocably to such use, was erroneous, and the decision of the case upon that false assumption was necessarily erroneous also.

But let us consider for a moment the illustration stated in the opinion of the Massachusetts Court.

Suppose that, when the private way assumed in the illustration was located and the lots abutting on it were sold, the land sold by the acre and at a price of $40 per acre. Suppose that with the lapse

of time it became evident that the whole tract, including the private way, could be sold for a valuable manufacturing or business purpose at $50 per foot for every foot of it, including the land covered by the way, the purchaser intending to discontinue the way and to build upon it.

The owner of the fee of the way and the owners of the abutting land, by uniting in a deed of the land, could extinguish the right of way and get $50 a foot for every foot of land within it.

Could the City of Boston, by laying out the way the day before the sale was consummated, deprive the owners of the fee and of the easement of their $50 per foot?

And, if the owner of the fee and the owners of the easement at the time of the taking preferred to wait until the land had so risen in value that they could sell it for $75 per foot, could the city, by laying it out as a way, avoid paying them the $50 per foot which was its value at the time of the taking?

Does not the case put by the Court as an illustration (*which was really the case decided by the Court, and not the case at bar*) assume one of two things, namely: either, *first*, that the owners of the different interests in the land had put it out of their power to sell and dispose of the land for any other use than for a way; or else, *second*, that it must appear *in evidence* in the case that the owners of the fee and of the rights of way, light, and air, could not have sold the land in question without destroying their access to their lots and thereby sacrificing more in value than they could gain by a sale of the land included in the way? In the case put by the Court as an illustration (which, as we have said, was the case decided, and which was not our case), if the respondent had shown that the petitioners had dedicated the way irrevocably to the public, or if it had shown by evidence that the petitioners could not have sold the land in the way without losing more on their abutting lots than they would gain by the sale of the land covered by the way, then it may, perhaps, be conceded, that the use of the land for a way was, and must be for all time, the most beneficial use to which it could be put for the petitioners, and that a taking which subjected the land to a substantially similar use could not result in damage to them.

Indeed, the opinion of the Massachusetts Court seems to recognize the necessity for such a state of proof, for the Court says (Record, p. 26):—

> "If they [the owners] were to receive the whole value of the land as an estate in fee simple, free from restrictions and incumbrances, they would be paid a large sum for the taking of an easement which *would not affect the use that they were making of the land*, and the use which, *very likely*, was *the most valuable* to which the land could *ever* be put, even if it never was taken for a public street."

Yet there was no evidence of this in the case.

We submit that it is not too much to say that something more must appear than a mere assumption by the Court, founded upon no evidence in the case, that it is "very likely" that the use which the petitioners were making of the land at the time of the taking was the most beneficial use to which the land could "ever" be put, before the respondent can be permitted to take from the petitioners land which was confessedly worth $60,000 and pay them nothing for it.

As a matter of fact, there was not a shred of evidence offered even to show that it was "very likely" that the use the petitioners were making of the land at the time of the taking was the most beneficial use which could ever have been made of it. There was no evidence at all upon this subject in the case.

> "Apart from said reservation it was possible and practicable for said Chamber of Commerce to have built over said reserve space including the land so taken, by the extension of the building now on said property, or by the erection of another building" (Record, p. 9).

The Court appears to have assumed that because the parties were making the use of this land which it appears that they were making of it at the time of the taking, and because the Chamber of Commerce had erected a building with reference to such a use, it must be inferred that no other use could ever be made of the land; but this is to confine the jury solely to the consideration of the use which the owner was making of the land at the time of the taking to the ex-

clusion of all consideration of the other uses to which it was adapted, and such a course is not permitted by the law, as we have already seen.

Boom Co. v. *Patterson*, 98 U. S. 403, and other cases *ubi supra*.

The land taken lies within a few feet of the Boston Custom House. Suppose that the Chamber of Commerce wished to remove from this spot and to erect a new building elsewhere.

Could it not have united with the Central Wharf and Wet Dock Corporation, and have sold its whole lot of 15,113 square feet, including the locus, to the United States for a Custom House?

Or suppose some large manufacturing concern or mercantile firm wished to acquire the whole tract to erect a building on.

There may well be a hundred uses to which the locus alone or the whole lot, including the locus, might have been put, had the owners wished to sell at the time when the taking was made.

What right has the Massachusetts Court to say that it is "very likely" that the use the petitioners were making of the land was the most beneficial use that could "ever" be made of the land?

Such a proposition is pure assumption, with no evidence whatsoever to support it.

It does not appear in this case what were the intentions of the Wharf Corporation and the Chamber of Commerce when the one delivered and the other accepted the deed of the property, including the locus with the reservation which has been spoken of. Such matter could not have appeared. Their intentions when they made the deed, were wholly immaterial on the question of the market value of the land at the time of the taking. It may, however, be useful in discussing this matter to assume a case.

Suppose the parties to the conveyance had agreed to keep this land open and unbuilt upon until they both united in the belief that the land had become too valuable for such a use, when they were to sell it either by itself or as part of the whole lot of 15,113 square feet, and to divide the proceeds equitably. They go to a scrivener and ask him to prepare a deed to convey the land and a contract covering their intentions. The scrivener prepares this deed with the reservation in it in favor of the Wharf Corporation of rights of way, light, and air, saying to the parties: "This is all you need.

Neither of you can sell the land to be built upon without the consent or co-operation of the other. Whenever you both agree that it is wise to sell it, you have only to unite in a deed; but until you both agree and unite in a deed the land must remain unbuilt upon. This deed is all that you need to effect your intentions. No other contract is required."

Now suppose on the other hand, instead of a conveyance with a simple reservation, such as was in fact made in this case, the parties had entered into a written contract reciting that it was their intention, and they agreed with each other that, whenever they should agree that the land had become too valuable to be devoted any longer to use for light and air, they would unite in a conveyance of it free of all encumbrances, so that the purchaser could build upon it, and would divide the proceeds in a certain proportion.

Would it occur to any one in that case to question their right to recover the fair value of the land if the city took it by eminent domain?

And are they to recover in the one case and not in the other?

Suppose when the conveyance was made the parties had no very clear intentions in the matter. If afterwards, the Chamber of Commerce wishes to move to another spot and wishes to sell this land, and the Wharf Corporation's interest to have the land continue open and unbuilt upon has ceased, and they find they can sell the land for $60,000, and propose to do so, can the city step in and deprive them of this right and of the value of the land by simply laying it out as a street and by saying to them: "Very likely the use you are now making of this land is the most beneficial use you can ever make of it. We fear that you may be tempted to sell the land at some time to be built upon to your great damage. Therefore, we will make the use you are now making of the land a perpetual use, and we will do that without paying you any damages, because we are doing you a favor by putting it out of your power ever to sell the land to be built upon to your everlasting injury."

If the petitioners by uniting in a deed on the day of the taking could have conveyed the land to a purchaser in fee simple in such wise as would enable the purchaser to make any of the uses of the land for which land in that locality was adapted (as they could have done), are they not entitled to recover of the City of Boston, as damages for the taking, such sum as the purchaser would have paid for

the land on that date? They could have got $60,000 on a private sale. Are they to get nothing on a forced sale?

And does not the measure of their damages depend only upon the extent of their title and upon what they had to sell and could have sold?

If they had dedicated the land irrevocably to the public, so that they could not have conveyed it to a purchaser to use for any or all of the purposes for which land so situated was adapted, unless all the world joined in the conveyance, of course they could not have recovered the value which the land would have had but for such dedication. But, if they have not so dedicated it, are they to be dealt with as if they had so dedicated it? "Said land taken had never been dedicated to the public, but was at all times kept in order and repair by said Chamber of Commerce" (Record, p. 9).

The right of these parties to damages, in other words, does not depend upon their intentions or want of intentions, upon their plans or views with reference to the land taken, or on the use they were in fact making of the land at the time of the taking or at any other time.—"Damages are not to be awarded in reference to the peculiar situation or circumstances or *plans* of the owner," per Knowlton, C. J., in *Maynard* v. *Northampton*, 157 Mass. 218, 219.—Their rights depend upon the title which they have and can give to the land, upon their ability to dispose of it for any or all the uses to which land thus located can be put. If they can convey a title such as will admit of a full, free, and unrestricted beneficial use of the land by the purchaser, they recover full damages.

If they can only convey something less than this, then the amount which they can recover is proportionately less.

This seems to us to be the whole of this case. The petitioners had a parcel of land which they could have sold for $60,000. The city elected to buy it, and it must pay the price.

Some emphasis is given in the respondent's requests for rulings and in the opinion of the Court to the fact that the city took only an easement in the land, and not the fee. The Court says in its opinion (Record, p. 26):—

> "If they were to receive the whole value of the land as an estate in fee simple, free from restrictions and incumbrances, they would be paid a large sum for the taking of an easement which would not affect the use that they were making of the

> land and the use which, *very likely*, was the most valuable to which the land could ever be put even if it never was taken for a public street."

We do not understand the Court to mean by this statement that the owner of land taken for a public way is not entitled to recover the full market value of the land taken, because an easement and not the fee is taken, because that is not the law.

We understand that by the use of this expression the Court merely wished to emphasize the fact that because we were using this land as we were using it at the time of the taking, and because the Court thought that it was "very likely" that that use was the most beneficial use to which the land would ever be put, the subjecting of the land by the city without our consent to a substantially similar use, which should be perpetual and which would preclude the possibility of our ever putting the land to any other use, was not and could not be a damage to us.

Nevertheless, as this statement of the Court is susceptible of a wider application, we wish to make it clear that the taking of land for a highway and subjecting it to that use in perpetuity, to the exclusion of all other uses, gives the owner of the land taken the right to recover the fair market value of the land taken, even though technically an easement and not the fee is taken. If what is taken is practically coextensive with the fee, and if the taking deprives the owner of the beneficial interest in the land, then it makes no difference in the *quantum* of the damage which he has sustained whether you call the taking a taking of an easement or a taking of the fee.

In *Lawrence* v. *Boston*, 119 Mass. 126, which was a case of land taken by the City of Boston to widen a street in which a lessee of the building on the land taken was suing for damages for the taking, the Court instructed the jury in part as follows (p. 128):—

> "The value of the leases is their market value; market value means the fair value of the property," etc. . . . "It is what it would bring at a fair public sale, where one party wanted to sell and the other to buy."

The Court said (p. 132):—

> "The instructions to the jury were such as have been usually given in similar cases in this Commonwealth and were correct and sufficient."

In *Edmands* v. *Boston*, 108 Mass. 535, the trial judge ruled that the amount to be apportioned to each lessee of part of the land taken by the city to widen Hanover Street was the market value of his lease at the time of the taking, less the market value of the occupation of the premises which he actually enjoyed between the date of the taking and the time when the land was actually entered upon by the city.

Held a correct ruling.

In *Chase* v. *Worcester*, 108 Mass. 60, 67, the Court said:—

> "Aside from the value of the land taken, the damages to the petitioner were the amount of depreciation of the remaining land," etc.

In *Parks* v. *Boston*, 15 Pick. 198, a petition for damages occasioned by the laying out of a street, C. J. Shaw said (p. 209):—

> "On the whole, independently of the authorities applicable to the case of an action for damages for the unlawful detention of property, the jury were correctly instructed, that in the estimate of damages done to an estate partly taken for the public use, the value of the estate on the day of the taking, was the true value to be taken by the jury in the appraisement of the damages."

In *Pitkin* v. *Springfield*, 112 Mass. 509, a petition for damages for land taken for a street, the trial Court instructed the jury,—

> "that in estimating the damages the petitioner had sustained, they should find the value of the land at the time it was in fact taken."

Held correct.

In *Newton* v. *Perry*, 163 Mass. 319, the Court said:—

> "We assume, in deference to the decisions, that the power to take and hold given by the statutes in this case only authorized the taking of an easement" (citing cases).
>
> "But it is plain from these, as from all the cases, that the purpose of the taking must fix the extent of the right." "The right, whether it be called an easement or by any other name, is statutory, and must be construed to be large enough to accomplish all that it is taken to do."

"One of the purposes for which the defendant's land was taken was for the protection of the plaintiff's water supply."

"It is too late for the defendants to deny that it was necessary to take the land for that purpose. It has been taken, *and they have been paid for it.*" . . .

"*The whole right* is paid for without regard to the probability of its being exercised."

In all these cases what was taken was an *easement.*

A perpetual easement which gives the public the exclusive right to use the surface and the land below the surface for purposes of public travel, including also the right to license the laying of street railway tracks, the laying of water pipes, drains, and sewers, the building of subways, tunnels, etc., deprives the owner of all right to the beneficial use of the land, and gives him the right to the same *quantum* of damages as if a barren fee had not been left in him.

Knowlton, C. J., in *New Eng. Tel. & Tel. Co.* v. *Boston Terminal Co.*, 182 Mass. 397, says (p. 399):—

that the public easement which is paid for "includes the use of all kinds of vehicles . . . and every reasonable means of transportation, transmission and movement beneath the surface of the ground, as well as upon or above it."

"Accordingly it has been held that the public easement which is paid for in assessing damages to the owner includes the use of the street for horse cars and electric cars, for wires of telegraph, telephone and electric lighting companies, and for water pipes, gas pipes, sewers and such other similar arrangements for communication or transportation as further invention may make desirable."

See, to the same effect, the opinion of Knowlton, C. J., in *Sears* v. *Crocker*, 184 Mass. 586, which case holds that the taking of an easement for the construction of a street gives the public the right to construct below the surface a tunnel or subway for the exclusive use of electric street cars.

The decision of the Massachusetts Court in the case at bar overlooks the vital fact that the petitioners by their agreement with reference to this land did not part with the right to sell the land to be used for any of the purposes for which it was adapted, while the taking by the city did deprive them of this right.

The right to use this land in common with the general public, as one of the public, by travelling over it, is not equivalent to the right to sell the land for $60,000. The decision also overlooks the fact stated in the Record, page 9, that it was possible and practicable for said Chamber of Commerce to have built over said reserved space, including the land so taken, by the extension of the building now on said property, or by the erection of another building, and the equally obvious fact that the Wharf Company might be induced to sell to the Chamber its interest in the land for this purpose.

See opinion of Mr. Justice Holmes in *Blaney* v. *Salem*, 160 Mass. 303.

There was no evidence in the case that the Central Wharf and Wet Dock Corporation ever had any land at any time that would be injuriously affected, if it should release the easements which it reserved in its deed to the Chamber of Commerce; or that the easements were appurtenant to any land belonging to the Wharf Company; or that said easements were any other than easements in gross; or that the Wharf Company would not be willing to release these easements to the Chamber of Commerce for a consideration, if the latter corporation wished to enlarge its present building.

See *Blaney* v. *Salem*, supra.

In Massachusetts, easements in gross may be reserved in a deed poll, and may be separately sold and conveyed.

Goodrich v. *Burbank*, 12 Allen, 459, 461.
Whittenton Mfg. Co. v. *Staples*, 164 Mass. 319, 328.
White v. *Crawford*, 10 Mass. 183.

The decision of the New York Court of Appeals

In the Matter of the Opening of Eleventh Avenue, 81 N. Y. 436

is a decision directly in point for our contention that, even in the case put by the Massachusetts Court as an illustration, substantial damages should be awarded.

In that case it appeared that H, being the owner of certain lands in the city of New York, executed conveyances and mortgages of various parcels, referring therein to certain streets and avenues which had not been laid out by legal authority, and the parcels conveyed and mortgaged were described as bounded by said streets and avenues.

Held that the conveyances, although not amounting to a dedication to the public of the land embraced in the specified streets and avenues, or constituting them public highways, created an easement in the grantees which, as between them and him, entitled them to have the land left open as streets for the benefit of their lots.

The city of New York afterwards laid out these streets and avenues as public ways.

Nominal damages only were awarded by the Commissioners, but the Court sent the Commissioners' report back to be corrected by awarding just compensation.

Held also, on the amended report which awarded the *full value of the land* to "unknown owners," that the rights and interests of all the parties interested were to be considered as having been taken by the city; that the award was equitably to be apportioned among them in proportion to their interests: and that, therefore, the owners of the easements were entitled to share in the award.

The Court in this case said (p. 448):—

> "The most plausible of the objections taken is that the award being intended to compensate for the loss or damage sustained by the parties interested in the land taken, the owners of the easement should not participate, because they were not deprived of their easement but retain their right of way over the avenue in an improved form. This argument, however, applies with equal force to the owner of the fee."

Again the Court said (p. 449):—

> "But the commissioners having, under the direction of the Court, awarded substantial and just compensation for the rights and interests of all parties interested in the lands and having treated them as subject to no public rights, the aggregate of this compensation must represent the entire value of the land taken, and there seems to be no means of equitably adjusting the rights of the parties except by pursuing the course adopted by the learned referee, of treating all these rights and interests as having been taken by the city, and apportioning the awards among the several parties in whom these rights and interests were vested."

In 27 Appellate Division, N. Y. 265, *In Matter Board of Street Opening, etc.*, an award for land taken by a city for street purposes

was made to unknown owners and the money was paid into court. The owner of the fee of the land taken claimed the money, as did also the owner of an easement that said property should be kept open as a street. The referee apportioned the value between the two, and his award was confirmed by the Court.

The Court said at page 266:—

> "It is quite apparent that two or more persons may have an interest in land which, taken together, would constitute an ownership of the land, and whether they are entitled as tenants in common to the fee of the land, or one is the owner of the fee, while the other is an owner of an estate, either for life or for years, or an easement to which the land is servient, they together are the owners of the land, and are entitled to the fund which stands in place of the land according to their respective interests. It was so expressly decided in Matter of Eleventh Avenue, 81 N. Y. 443."

In *Winthrop* v. *Welling*, 2 App. Div. N. Y. 229, there were two adjoining owners of houses who agreed under seal not to build over the rear of their lots. One of the houses had a mortgage on it made prior to this agreement. The mortgage was foreclosed, and a surplus of four thousand dollars was left. The owner of the adjoining lot claimed that he had a right to some portion of this surplus because of his easement that such property should be forever kept open. The Court held that the foreclosure proceedings, being prior to the easement, destroyed it, but that said adjoining owner had a right to share in the proceeds to the extent of his easement.

The Court said (p. 233):—

> "The interest that these two parties held in this surplus money that was the proceeds of the sale of this strip of land, bears a close resemblance to that of the owner of the fee of land, subject to an easement, when the land has been taken under the right of eminent domain; and in such a case it is settled that the amount awarded for the value of the land, stands in the place of the land, and is to be divided among those owning the land, and a person owning an easement in such a strip of land is entitled to a substantial amount of such award."

In Re Canal Place, 101 N. Y. Supplement, 397, in the city of New York, certain land was taken which was operated by its owner as a

canal and was subject to easement of use by abutting owners. It was found that it had never been dedicated to the public. In proceedings duly taken the Commissioners found the total value of the property, and apportioned this sum between the holders of the easements and the owner of the canal and the soil under it. The abutting owners claimed that the ownership of the fee of the land and soil under it was merely nominal, and that the easements prevented the owner of the fee from making any use of the property.

The Court said at page 401:—

> "The principle insisted upon where a mere nominal fee is held subject to an easement which prevents the owner of the land from any use of his property, is applicable to cases where there has been a public dedication of the property for public uses. A right in property which is reserved by its owner, although subject to an easement of other private individuals, is property for which the State, or those acting under authority conferred by the State, must pay, if the property be condemned for a public use. If the owner of abutting property is awarded the value of his easement in the property taken, he can have no cause of complaint because the owner of the fee is awarded the value of the fee."

This case also is reported in 115 App. Div. 458, and in 191 N. Y. 525. The award in the lower Court was modified in the upper Court, but the principle was established that substantial damages should be given to both the owner of the fee and the owner of the easement.

In Re Jerome Avenue, 105 N. Y. Supplement, 319, in the city of New York, the city took land for a public park. Part of the land taken was subject to easements of light, air, and access in the adjoining property already owned by the city. In the proceedings which were taken the Commissioners gave to the owner of the fee of the land taken the full value of the property, apparently over $37,000. The Court held that this award was erroneous, and that the award should be apportioned, and that the city should be given the value of its private easement of light, air, and access, and the owner given the value of the fee subject to the easements.

These cases hold that the owners of different estates or interests in the land taken, together constitute the owners of the land; that they are entitled to recover full damages which are to be apportioned

between them according to their interests. If this is the law applicable to the state of facts supposed in the illustration put by the Supreme Judicial Court of Massachusetts in its opinion in the case at bar, where it was assumed that the land taken, as in these New York cases, formed a part of a private way, *a fortiori* it is the law applicable to this case, where the land taken never formed any part of any way, public or private, but was owned by these three petitioners, who could have sold it, free and unencumbered, on the day of the taking for $60,000.

And finally:—

The reasoning of this Court in denying substantial damages to the railroad company in *Chicago, Burlington, etc., R.R.* v. *Chicago*, 166 U. S. 226, the authority already cited in this brief as sustaining the jurisdiction of the Court in this case, amply sustains our claim for substantial damages in the case at bar.

In the former case the argument of the railroad company that it might have sold the land taken for the street, which formed a part of its right of way, was met by this Court by the statement that the railroad acquired its title only by virtue of a legislative authority which permitted it to take the land in question to be used for railroad purposes as a part of its railroad right of way, so that it was precluded from selling the land to be built upon.

And to the argument of the railroad company, that perhaps it might have secured the authority of the State legislature to sell the land, this Court replied that to make that supposition was to enter upon the field of speculative inquiry.

Was the title of the petitioners in the case at bar dependent upon any legislative grant or authority which in any way limited them in their right to dispose of the fee of the land by building on it, or by selling it to others to be built upon by them?

Did the petitioners in the case at bar require any legislative authority to enable them to sell the land taken?

Were they not at liberty to make any use they saw fit of the land taken, and did the use which they might make of it depend upon anything but their own volition?

ASSIGNMENT OF ERROR NO. 12.

The evidence offered by the respondent and admitted against the objections of the petitioners.

This evidence was wrongly admitted for the reasons about to be stated, although it is not necessary to spend much time on this branch of the case, because, if the petitioners are right in their main contention, this question becomes wholly immaterial, because whether this evidence was admissible or not, whether it was admitted or not, the agreement of counsel was "that if the law was substantially as stated in the petitioners' requests for rulings, damages were to be assessed for the petitioners in the sum of $60,000," and this was to be done notwithstanding the fact that such evidence was in the case.

This evidence only becomes material under the terms of the agreement of counsel, in case the respondent's contentions as to the law of the case were correct. If they were, then this evidence was to furnish the reason in fact for the entry of judgment in the smaller sum. To quote from the agreement again:—

> "and if as matter of law in the state of the title at the time of the taking the petitioners were in no event entitled to full damages, estimating the same as if the land taken were an entire estate and as if it were at the time of the taking, the sole property of one owner in fee simple, *and* if the evidence offered by the respondent was admissible and competent, *and* the law was substantially as stated in the respondent's requests for rulings, the petitioners' damages should be $5,000 without interest."

Thus it will be seen that, if the petitioners' contention as to the main question is correct, they are to have damages in the sum of $60,000, regardless of this evidence.

Nevertheless, this evidence was wrongly admitted, and for the following reasons:—

> "The respondent offered to show by the testimony of witnesses qualified to testify as to the fair market value of land in this part of the City of Boston, that as the land at the time of the passage of the order was owned by the Boston Chamber of Commerce, subject to the reservation and restriction that it could not be built on, which restriction was of great value to the Central Wharf and Wet Dock Corporation, the damage

> to the fair market value of the estate of the Boston Chamber of Commerce by reason of said street taking was little or nothing."

In other words, the respondent undertook, by the testimony of experts in land values, to prove a proposition of law.

The law of the case obviously was for the Court to decide, and such a proposition as the respondent undertook to establish by the testimony of witnesses was not and could not be the subject of expert testimony.

In the next place, even if such a proposition could be the subject of expert testimony, the witnesses offered by the respondent, being merely qualified to testify as to land values, were not qualified to testify on this question of law.

And, finally, in addition to these obvious objections, the evidence was inadmissible, in that it dealt only with the damages of the Chamber of Commerce alone, and did not deal with the only question in the case, namely, the amount of the entire damages.

Inasmuch as the petitioners had filed in the cause the stipulation that the damages might be assessed in a lump sum and need not be apportioned among the petitioners, inasmuch as the statute permits this, as we have seen, the evidence, even if it had been otherwise competent was directed to an immaterial issue, to an issue not involved in the case, and on this ground the evidence was immaterial and inadmissible.

> "The provision for separate valuations of different estates or interests, seems intended for the benefit of the claimants: and if they all claim one assessment, without desiring a separate valuation, it seems to be a waiver, so that the respondents, as they cannot be injured by a single assessment, can take no exception to it."

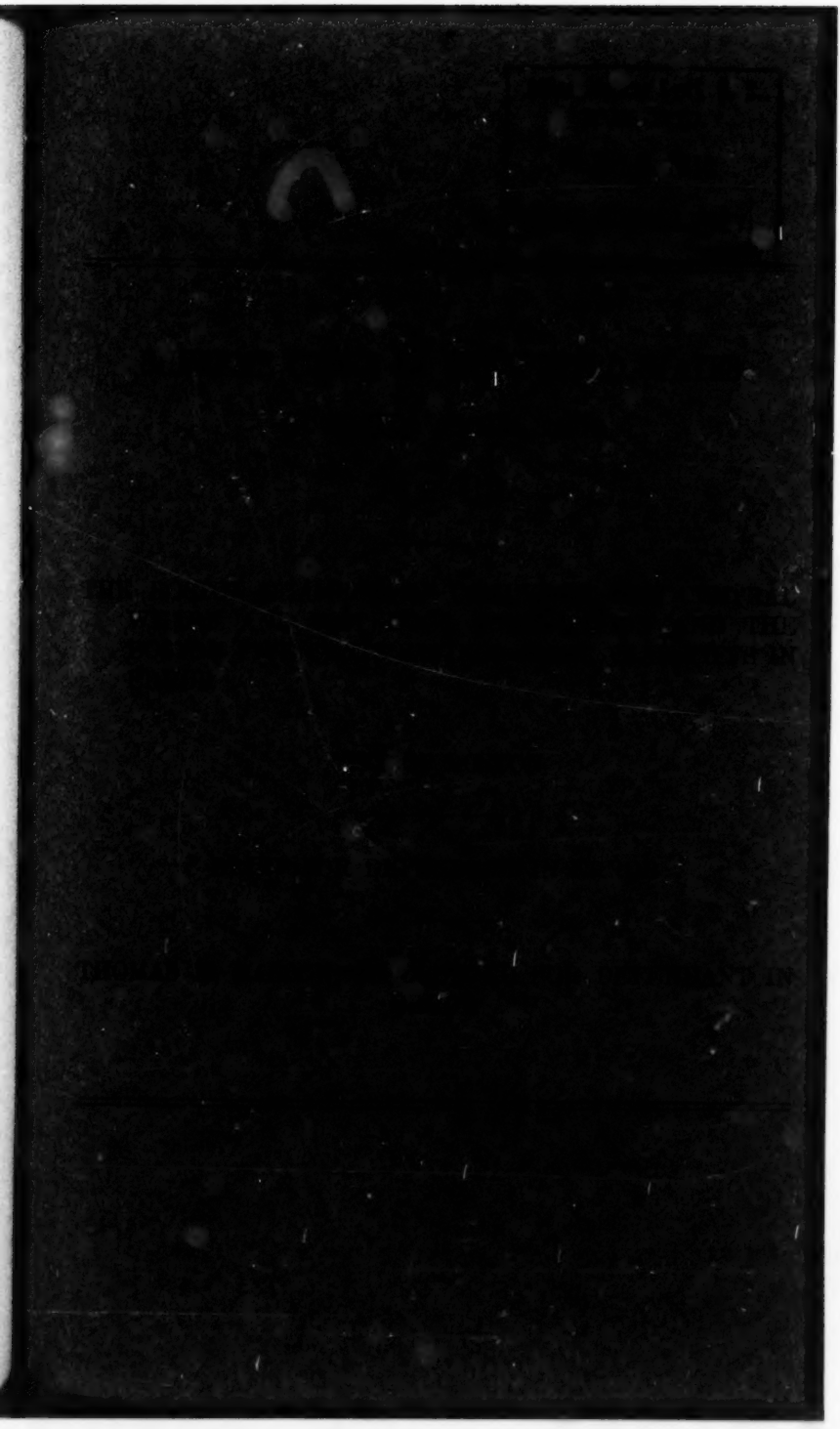
Chief Justice Shaw in *Proprietors of Locks, etc.* v. *Nashua & Lowell R.R.*, 10 Cush. (Mass.) 385, 386, 387.

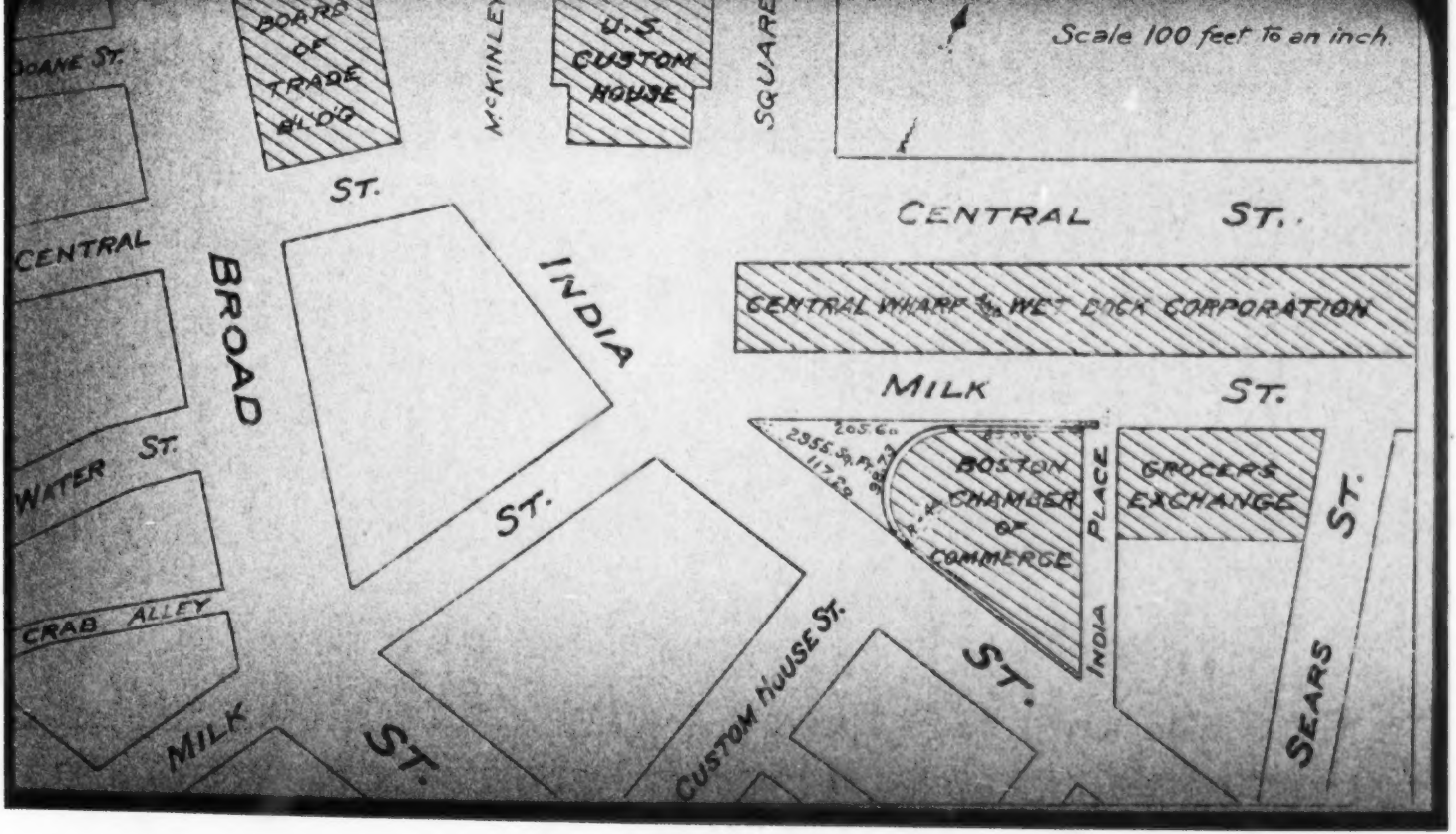
The petitioners, having agreed upon an apportionment of the damages among themselves, could not be compelled to call experts at great expense to testify upon that subject, and could not be compelled to prolong the trial upon an issue which had been dispensed with, and the respondent was not interested in the apportionment. If the total damages were $60,000, it makes no difference to the respondent

how they were to be divided among the petitioners. The statutes under which this proceeding was brought, by requiring persons having different interests in the same land taken for a public way to join in one proceeding, and by providing that the entire amount of damages shall first be found by the jury, prevent the possibility of the respondent's having to pay any more than the full market value of the land taken, which danger it might incur, if the damages of the owners of different interests were to be separately assessed at different times by different juries, since, if the latter course were to be pursued, it is evident that a jury in assessing the damages of the Chamber of Commerce might award a large percentage to the Chamber of Commerce, deeming the damages sustained by the Central Wharf and Wet Dock Corporation insignificant in amount, while another jury in assessing the damages of the Wharf Corporation might allow that corporation large damages, deeming the damages of the Chamber of Commerce slight. But with the provisions of the statute requiring all persons having different interests in the same land to join in one proceeding, and requiring entire damages to be first assessed, the rights of the respondent are protected and it ceases to have any further interest in the division of the damages among the petitioners.

It is submitted that the judgment of the Court below should be reversed, and the case remanded, with directions to enter a judgment for the petitioners for Sixty Thousand Dollars.

CHARLES A. WILLIAMS,
CHARLES S. HAMLIN,
Counsel.

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INDIA ST.
CENTRAL WHARF & WET DOCK CORPORATION
MILK ST.
WATER ST.
205 Co.
2955 Sq. Ft.
117 Co.
BOSTON CHAMBER OF COMMERCE
INDIA PLACE
GROCERS EXCHANGE
SEARS ST.
CRAB ALLEY
MILK ST.
CUSTOM HOUSE ST.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 99

THE BOSTON CHAMBER OF COMMERCE, THE CENTRAL WHARF AND WET DOCK CORPORATION AND THE BOSTON FIVE CENTS SAVINGS BANK, PLAINTIFFS IN ERROR

v.

CITY OF BOSTON

BRIEF FOR DEFENDANT IN ERROR

Statement of the Case

The plaintiff in error, the Boston Chamber of Commerce, was the owner of certain land containing over 15,000 square feet, on which it had constructed a building for its own uses, situated on India street and on a private way known as Central Wharf, or Central Wharf street, in Boston.

The plaintiff in error, the Central Wharf and Wet Dock Corporation, originally had laid out and owned this private way on Central Wharf street, and in 1890 had sold to the Chamber of Commerce the land on which its building stood, and by the deed had reserved to itself, its successors and assigns, rights of way, light and air upon that portion of the land conveyed, consisting of 3,539 square feet, which included the way and furnished an open space or square at the junction of the way with India street.

The Central Wharf and Wet Dock Corporation also had conveyed land to other owners bounded and facing on this way known as Central Wharf street and the open space.

The building erected by the Chamber of Commerce had a curved front conforming to the boundary line of that portion of the reserved space adjacent to it.

The plaintiff in error, the Boston Five Cents Savings Bank, held a mortgage on the land of the Boston Chamber of Commerce, including the portion reserved, and subject to the same reservation of rights of way, light and air.

In this condition of the title, occupation and use of the property, the Street Commissioners of Boston, on March 21, 1901, laid out this private way known as Central Wharf street as a public street and took a portion of the reserved space amounting to 2,955 square feet and estimated that no persons had sustained damage thereby.

The plaintiffs in error brought this petition jointly under Revised Laws, chapter 48, section 20, as follows:

"If there are several parties who have several estates in the same property at the same time, other than the estates and interests for which provision is made in section seventeen, and the property is taken or damaged, in whole or in part, by laying out, relocating, altering or discontinuing a highway, or by making specific repairs thereon, and one of such parties applies for a jury to ascertain his damages, the other parties may become parties to the proceedings under such petition, and the damages of all of them may be determined by the same jury, in the manner provided in the four following sections."

Section 17, referred to in section 20, is as follows:

"If a tenant for life or for years and the remainderman or reversioner sustain damages in their property by the laying out, relocation, alteration or discontinuance of, or by specific repairs on, a highway, or if the property is encumbered by a contingent remainder, executory devise or power of appointment, entire damages, or an entire amount as indemnity, shall be assessed without apportionment thereof; and shall be paid to, or be recoverable by, any person whom the parties may appoint, and be held in trust by him for their benefit according to their respective interests. The trustee shall, from the income thereof, pay to the reversioner or remainderman the value of any annual rent or other payment which would, but for such damages, have been payable by the tenant, and the balance thereof to such tenant during the period for which his estate was limited, and upon its termination he shall pay the principal to the reversioner or remainderman."

The four sections following section 20 relate to matters of procedure.

Section 21 provides that notice shall be given to all persons interested to become parties to the proceedings where one files an application for jury trial.

Section 22 is as follows:

"If, on such hearing, the jury find any of the parties entitled to damages, they shall first find and set forth in their verdict the total amount of damages sustained by the owners of such property, estimating the same as an entire estate and as if it were the sole property of one owner in fee simple; and they shall then apportion such damages among the several parties whom they find to be entitled thereto, in proportion to their several interests and to the damages sustained by them, respectively, and set forth such apportionment in their verdict; and if they find that any party has not sustained damage, they shall set forth in their verdict that they award him no damages."

Sections 23 and 24 provide that the verdict of the jury shall be conclusive upon all parties who have had notice, and a bar to any person who fails to become a party, and that each party shall recover or be liable to the town for costs; but that any party may file a relinquishment of claim and be free of costs.

The petitioners filed a stipulation in the case that the jury might find and return a verdict for the total amount of damages sustained by the owners of the property involved in this suit, estimating the same as an entire estate and as if it were the sole property of one owner in fee simple, and that the total amount of damages so found need not be apportioned by the jury in the verdict among the parties entitled thereto. The defendant in error refused to assent to any such disposition of the case.

The plaintiffs in error contended that under the statute, as the owner of the land and the party for whose benefit the restriction was imposed and the mortgagee had joined together in bringing the petition and had filed the above stipulation, they were entitled as a matter of law to what the fair market value of the estate would have been if there had been no restriction on its use at the time of the taking and it could have been sold with a perfectly clear title to a party who desired to erect a building on it.

It was agreed by the parties that if this were the law, and the respondent could not prove the existence of the restriction and its effect upon the market value of the property, the damages should be assessed at $60,000.

The respondent contended that the damages should be assessed as of the time of the taking; that at the time of the taking there existed this restriction which did affect the market value of the property, said estate being the property of the Boston Chamber of Commerce, subject to a mortgage, and not the property of the Central Wharf Company, and that the jury could take into consideration the existence of this restriction on its use and the probability or improbability of its being released as affecting the value of the property.

It was agreed in substance that if the existence of this restriction could be proved the damages should be assessed at $5,000.

The trial court ruled in favor of the contention of the defendant in error and found for the plaintiffs in the agreed sum of $5,000. The trial court further ruled that in the state of the title at the time of the taking, the plaintiffs in error, as matters of law, were in no event, nor were any one or more of them, entitled to recover the full market value of the property estimated as if the property were free from reservations and restrictions, and that the statute so construed would not be unconstitutional under the Constitution of the United States.

The Supreme Judicial Court, the highest court in the State of Massachusetts, decided the ruling to be correct and ordered judgment to be entered on the verdict of $5,000. The plaintiffs in error filed seventeen assignments of error, presenting, in substance, two questions,— first, whether the construction of the statute as set forth in the opinion of the Massachusetts Supreme Court violated the Constitution of the United States by depriving the plaintiffs in error of their property without due process of law and just compensation; second, whether a person is deprived of his property without just compensation when the taking municipality is allowed by the trial court to prove the existence on the property of a restriction which prevents it from being used for any valuable purpose until said restriction is released; for the plaintiffs have agreed that if the restriction could be proved, $5,000 was full compensation.

ARGUMENT

I

Damages, when property is taken, are to be assessed as of the time of the taking.

Parks *v.* Boston, 15 Pick. 198.
Cobb *v.* Boston, 109 Mass. 438.
Pitkin *v.* Springfield, 112 Mass. 509.
Burt *v.* Merchants Ins. Co., 115 Mass. 1.
Bates *v.* Boston El. Ry., 187 Mass. 328.

II

The construction of the statute by the highest court of the State of Massachusetts gave the plaintiffs in error just compensation measured by the loss caused them. The decision of the Court entitled them to receive the value of what they have been deprived. To have awarded more would have been unjust to the public. At the time of the taking of the easement of public travel the land taken was already subject to rights of way and to rights of light and air not only to the Central Wharf and Wet Dock Corporation but to its assigns, and the owner of the land so taken may be limited in his recovery to nominal damages.

Bartlett *v.* Bangor, 67 Maine, 460.
Walker *v.* Manchester, 58 N. H. 438.
Wilkins *v.* Same, 74 N. H. 275.
In re Ethel Street, 24 N. Y. Supp. 689.
Olean *v.* Steyner, 135 N. Y. 341.
In re Adams, 141 N. Y. 297.
People *ex rel* Washburn *v.* Common Council, 128 App. Div. (N. Y.) 44, 49.
Gamble *v.* Philadelphia, 162 Pa. St. 413.
Chicago, Burlington & Quincy R. R. Co. *v.* Chicago, 166 U. S. 226.

Servitudes which diminish the value of land are a legitimate ground for a reduction of damages.

Tobey *v.* Taunton, 199 Mass. 411.
Crowell *v.* Beverly, 134 Mass. 98.

See also

Allen *v.* Boston, 137 Mass. 319.
N. E. Tel. & Tel. Co. *v.* Boston Terminal Co., 182 Mass. 400.

III

The filing of a stipulation signed by the plaintiffs in error could not make the property taken unincumbered building land, and as such the property of a single owner in fee, when at the time of the taking it was not. To so construe the statute would have been to deprive the public of property without due process of law rather than the plaintiffs in error. The purpose of the statute was to protect the public from paying more than the entire damage to the entire property where several interests shared in this damage; to provide that the amount of this damage should include all the damage and all the interests; and to provide that at one hearing the jury should try all the claims and determine the amount of each by the apportionment each bore to all the interests as a whole. The filing of this stipulation did not wipe out the restriction nor change the condition of the property as it existed at the time of taking and thereby create a fee simple in unincumbered building land in a single owner, either as a matter of law or as a matter of fact. Parties by their private agreements or stipulations cannot bind the Court to a construction of a statute contravening the intent of the Legislature to protect the public in the amount of damages to be paid for the taking of an easement of travel in a pre-existing private way or land burdened by a similar restriction. The legal effect, if it should be given any, of the stipulation in the present case would be that the jury could bring in a general and joint verdict in favor of and conclusive upon all the petitioners without passing on the questions whether the Central Wharf and Wet Dock Corporation was entitled to something or nothing, whether the Boston Chamber of Commerce was entitled to all the damages less the claim of the savings bank, and need not calculate the amount due on the mortgage to the Five Cents Savings Bank.

It appears plainly from the cases cited that if it were not for this stipulation the respondent could have proved the condition of the title at the time of the taking and the other facts set forth in the report. The only legal question raised by the report is, — Does the filing of a stipulation of this nature have the legal effect claimed for

it by the petitioners. The defendant's claim is that there is no statute or rule of the common law which gives to parties who individually or collectively are damaged by a public taking only $5,000, the right by filing a stipulation of this kind, to make the community pay the damages which would have been sustained by entirely different parties who had owned land under a different title under entirely different circumstances, and it was so decided by the Supreme Judicial Court of the Commonwealth of Massachusetts in the case at bar, as will be seen by the report.

The contention of the plaintiffs in the Superior Court and Supreme Court was that section 20 of chapter 48 of the Revised Laws of Massachusetts absolutely required after the filing of such a stipulation the assessing of the damages in the manner contended by themselves. The Supreme Court of Massachusetts decided against this contention, which is really all there is in the case at bar.

This case, therefore, comes within the general rule that the United States Supreme Court will follow the construction of a state statute given it by the highest court of the state.

Maiorano *v.* B. & O. R. R. Co., 213 U. S. 268.
Smiley *v.* Kansas, 196 U. S. 447, 455.
Tullis *v.* Lake Erie & Western R. R. Co., 175 U. S. 348, 353.
Covington *v.* Kentucky, 173 U. S. 231.

THOMAS M. BABSON
Corporation Counsel City of Boston
for Defendant in Error

BOSTON CHAMBER OF COMMERCE *v.* CITY OF BOSTON.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 99. Argued March 2, 3, 1910.—Decided April 4, 1910.

This court accepts the construction of a state statute as to condemnation of land given to it by the state court.

While in condemnation proceedings the mere mode of occupation does not limit the right of an owner's recovery, the Fourteenth Amendment does not require a disregard of the mode of ownership, or require land to be valued as an unencumbered whole when not so held.

Where one person owns the land condemned subject to servitudes to

others, the parties in interest are not entitled to have damages estimated as if the land were the sole property of one owner, nor are they deprived of their property without due process of law within the meaning of the Fourteenth Amendment because each is awarded the value of his respective interest in the property.

195 Massachusetts, 338, affirmed.

THE facts are stated in the opinion.

Mr. Charles A. Williams and *Mr. Charles S. Hamlin* for plaintiff in error:

The market value of the "locus," the land taken for this street at the time of the taking, was $60,000.

Consequently, the owners in fee simple of the land unencumbered were entitled to recover in this proceeding $60,000. *Boom Company* v. *Patterson*, 98 U. S. 403.

In determining the damages sustained by an owner of land taken by eminent domain, the use which the landowner at the time of taking happens to be making of his land is not the only thing to be considered. The use which the owner of the land taken is making of the land at the time of the taking is absolutely and wholly immaterial. *Maynard* v. *Northampton*, 157 Massachusetts, 218, 219; *Eastern R. R.* v. *Boston & Maine R. R.*, 111 Massachusetts, 125, 132; and see also *Providence &c. R. R.* v. *Worcester*, 155 Massachusetts, 35; *Conness* v. *Commonwealth*, 184 Massachusetts, 541; *Fales* v. *Easthampton*, 162 Massachusetts, 422, 425.

The right of the petitioners to recover the fair market value of the land is not lost because of the fact that there is more than one owner, nor by reason of the fact that the entire title is held by different owners who own different interests, nor because of the fact that at the time of the taking the petitioners were making a use of the land similar in kind to the use which the city intended by its taking, to make of it.

And this although neither without the coöperation of the other could convey a clear title to the whole estate. *Edmands* v. *Boston*, 108 Massachusetts, 535.

The statute was not intended to be used so as to prevent

the recovery of full damages, *i. e.*, the fair market of the land taken. It was only intended to prevent the recovery of more than the fair market value.

The taking of land for a highway and subjecting it to that use in perpetuity, to the exclusion of all other uses, gives the owner of the land taken, the right to recover the fair market value of the land taken, even though technically an easement and not the fee is taken. If what is taken is practically co-extensive with the fee, and if the taking deprives the owner of the beneficial interest in the land, then it makes no difference in the quantum of the damage which he has sustained whether you call the taking a taking of an easement or a taking of the fee. *Lawrence* v. *Boston*, 119 Massachusetts, 126; *Edmands* v. *Boston*, 108 Massachusetts, 535; *Chase* v. *Worcester*, 108 Massachusetts, 60, 67; *Parks* v. *Boston*, 15 Pick. 198; *Newton* v. *Perry*, 163 Massachusetts, 319; *New Eng. Tel. & Tel. Co.* v. *Boston Terminal Co.*, 182 Massachusetts, 397, 399; *Sears* v. *Crocker*, 184 Massachusetts, 586.

The decision of the state court overlooks the vital fact that the petitioners by their agreement with reference to this land did not part with the right to sell the land to be used for any of the purposes for which it was adapted, while the taking by the city did deprive them of this right. *Blaney* v. *Salem*, 160 Massachusetts, 303.

In Massachusetts, easements in gross may be reserved in a deed poll, and may be separately sold and conveyed. *Goodrich* v. *Burbank*, 12 Allen, 459, 461; *Whittenton Mfg. Co.* v. *Staples*, 164 Massachusetts, 319, 328; *White* v. *Crawford*, 10 Massachusetts, 183; and see also *Matter of the Opening of Eleventh Avenue*, 81 N. Y. 436; *S. C.*, 27 App. Div. (N. Y.) 265; *Winthrop* v. *Welling*, 2 App. Div. (N. Y.) 229; *Re Canal Place*, 101 N. Y. Supp. 397; see also 115 App. Div. 458; and 191 N. Y. 525; *Re Jerome Avenue*, 105 N. Y. Supp. 319.

Mr. Thomas M. Babson for defendant in error:

Damages, when property is taken, are to be assessed as of

the time of taking. *Parks* v. *Boston*, 15 Pick. 198; *Cobb* v. *Boston*, 109 Massachusetts, 438; *Pitkin* v. *Springfield*, 112 Massachusetts, 509; *Burt* v. *Merchants' Ins. Co.*, 115 Massachusetts, 1; *Bates* v. *Boston El. Ry.*, 187 Massachusetts, 328.

The construction of the statute by the state court gave the plaintiffs in error just compensation measured by the loss caused them. The decision entitled them to receive the value of what they have been deprived. To have awarded more would have been unjust to the public. At the time of the taking of the easement of public travel the land taken was already subject to rights of way and to rights of light and air not only to the Wharf and Dock Corporation but to its assigns, and the owner of the land so taken may be limited in his recovery to nominal damages. *Bartlett* v. *Bangor*, 67 Maine, 460; *Walker* v. *Manchester*, 58 N. H. 438; *Wilkins* v. *Same*, 74 N. H. 275; *In re Ethel Street*, 24 N. Y. Supp. 689; *Olean* v. *Steyner*, 135 N. Y. 341; *In re Adams*, 141 N. Y. 297; *Washburn* v. *Common Council*, 128 App. Div. (N. Y.) 44, 49; *Gamble* v. *Philadelphia*, 162 Pa. St. 413; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226.

Servitudes which diminish the value of land are a legitimate ground for a reduction of damages. *Tobey* v. *Taunton*, 199 Massachusetts, 411; *Crowell* v. *Beverly*, 134 Massachusetts, 98. See also *Allen* v. *Boston*, 137 Massachusetts, 319; *New England Tel. & Tel. Co.* v. *Boston Terminal Co.*, 182 Massachusetts, 400.

The filing of a stipulation signed by the plaintiffs in error could not make the property taken unencumbered building land, and as such the property of a single owner in fee, when at the time of the taking it was not. To so construe the statute would have been to deprive the public of property without due process of law rather than the plaintiffs in error. Thus the United States will follow the construction of a state statute given it by the highest court of the State. *Maiorano* v. *B. & O. R. R. Co.*, 213 U. S. 268; *Smiley* v. *Kansas*, 196 U. S. 447, 455; *Tullis* v. *Lake Erie & Western R. R. Co.*, 175 U. S. 348, 353; *Covington* v. *Kentucky*, 173 U. S. 231.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for the assessment of damages caused by the laying out of a public street over 2955 square feet of land at the apex of a triangle between India Street and Central Wharf Street in Boston, the latter being a private way between Milk Street and Atlantic Avenue, laid out by the same order as part of the same street. The Chamber of Commerce had a building at the base of the triangle and owned the fee of the land taken. The Central Wharf and Wet Dock Corporation, which owned other land abutting on the new street, had an easement of way, light and air over the land in question, and the Boston Five Cents Savings Bank held a mortgage on the same, subject to the easement. These three were the only parties having any interests in the land. They filed an agreement in the case that the damages might be assessed in a lump sum, the city of Boston refusing to assent, and they contended that it was their right, as matter of law, under the Massachusetts statute, R. L. c. 48, p. 495, §§ 20, 21, 22, and the Fourteenth Amendment, to recover the full value of the land taken, considered as an unrestricted fee. The city on the other hand offered to show that the restriction being of great value to the Central Wharf and Wet Dock Corporation, the damage to the market value of the estate of the Chamber of Commerce was little or nothing, and contended that the damages must be assessed according to the condition of the title at the date of the order laying out the street. It contended that the jury could consider the improbability of the easement being released as it might affect the mind of a possible purchaser of the servient estate, and that the dominant owner could recover nothing, as it lost nothing by the superposition of a public easement upon its own. The parties agreed that if the petitioners were right, the damages should be assessed at $60,000, without interest, but if the city was right they should be $5,000. The judge before whom the case was tried ruled in favor of the city, and this ruling was sustained by the Supreme

Judicial Court, upon report. 195 Massachusetts, 338. A judgment was entered in the court where the record remained, and then the case was brought here.

We assume in favor of the petitioners, the plaintiffs in error, that their only remedy was under the statute; and we give them the benefit of the doubt in interpreting the decision of the court, so far as to take it to mean that the statutes of Massachusetts authorize the taking of land held as this was with no other compensation than according to the principle laid down. In short, we assume in their favor that the constitutional question is open, and that the case properly is not to be dismissed. But we are of opinion that upon the only possible question before us here the decision was right.

Of course we accept the construction given to the Massachusetts statute by the state court. *Maiorano* v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 268, 272. The only question to be considered is whether when a man's land is taken he is entitled by the Fourteenth Amendment to recover more than the value of it as it stood at the time. For it is to be observed that the petitioners did not merely contend that they were entitled to have the jury consider the chance of getting a release, for whatever it might add to the market value of the land, as the city merely contended that the jury should consider the chance of not getting one. The petitioners contended that they had a right, as matter of law under the Constitution, after the taking was complete and all rights were fixed, to obtain the connivance or concurrence of the dominant owner, and by means of that to enlarge a recovery that otherwise would be limited to a relatively small sum. It might be perfectly clear that the dominant owner never would have released short of a purchase of the dominant estate—in other words, that the servitude must have been maintained in the interest of lands not before the court—but still, according to the contention, by a simple joinder of parties after the taking, the city could be made to pay for a loss of theoretical creation, suffered by no one in fact.

The statement of the contention seems to us to be enough.

It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery. *Boom Co.* v. *Patterson*, 98 U. S. 403, 408. *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Co.*, 197 U. S. 430, 435. But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as matter of law to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement. See *Bartlett* v. *Bangor*, 67 Maine, 460, 468. *Walker* v. *Manchester*, 58 N. H. 438, 441. *Gamble* v. *Philadelphia*, 162 Pa. St. 413. *Matter of Adams*, 141 N. Y. 297. *Olean* v. *Steyner*, 135 N. Y. 341, 346. *Crowell* v. *Beverly*, 134 Massachusetts, 98. There is some subordinate criticism under the alternative agreement giving them only $5,000. It is noticed that this was conditioned upon the petitioners not being entitled as just stated, and upon the admissibility of the evidence offered by the city, and upon the substantial correctness of the requests for rulings; and it is said that the evidence was not admissible. It seems to us that the worst objection to it was that it was offered to prove the obvious. But taking the agreement fairly we think it meant only to contrast broadly the position of the two sides, and made the result depend upon which was right.

Judgment affirmed.